84-78

No. .....

In The

Supreme Court of the United States

October Term, 1983

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ROBERT L. CAMPBELL, et al,

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION;
FEDERAL AVIATION ADMINISTRATION,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE FEDERAL CIRCUIT COURT OF APPEALS

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

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QUESTIONS PRESENTED FOR REVIEW

A. DID THE CHANGING OF THE BURDEN OF PROOF AND THE CREATION OF A NEW PRESUMPTION, AFTER THE PETITIONERS' HEARING VIOLATE THE ADMINISTRATIVE PROCEDURE ACT OR THE PETITIONERS' RIGHT TO THE DUE PROCESS OF LAW?

B. DID THE FEDERAL CIRCUIT COURT OF APPEALS COMMIT ERROR IN HOLDING THAT MERE ABSENCE DURING A STRIKE OF GENERAL KNOWLEDGE CAN SUSTAIN A FINDING OF STRIKE PARTICIPATION?

C. DID THE FAILURE OF THE AGENCY TO GIVE A FULL SEVEN DAYS TO RESPOND TO THE NOTICE OF PROPOSED REMOVAL REQUIRE REVERSAL OF THE TERMINATION OF THE PETITIONERS?

D. DID THE PROMULGATION OF ADVISORY OPINIONS VIOLATE 5 U.S.C. 1205(g) AND THE PETITIONERS' RIGHT TO THE DUE PROCESS OF LAW?

E. IS REMOVAL THE MANDATORY MINIMUM PENALTY FOR STRIKING AGAINST THE UNITED STATES?

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PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The United States Court of Appeals for the Federal Circuit rendered its decision in the instant case on May 18, 1984. On June 7, 1984, the Petitioners' motion for a

stay of mandate was granted by the United States Court of Appeals for the Federal Circuit, said stay to expire on July 9, 1984 if a petition for a writ of certiorari is not filed with this Court. Jurisdiction is sought pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the following statutes and regulations:

A. "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ." Fifth Amendment, United States Constitution.

B. § 1918.

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike

against the Government of the United States or the government of the District of Columbia;

shall be fined not more than $1,000 or imprisoned not more than one year and a day or both. 18 U.S.C. § 1918.

C. § 7311.

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia. 5 U.S.C. § 7311.

D. § 7513.

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchaper, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request. 5 U.S.C. § 7513.

E. § 1205.

(a) The Merit System Protection Board shall—

* * *

(g) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register. 5 U.S.C. § 1205.

F. § 551.

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix. 5 U.S.C. § 551.

G. § 553.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give in interested person the right to petition for the issuance, amendment, or repeal of a rule. 5 U.S.C. § 553.

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STATEMENT OF THE CASE

The Petitioners were employed by the Federal Aviation Administration (hereinafter referred to as "agency") as air traffic control specialists. In August of 1981, a nationwide strike of air traffic controllers was called by

the Professional Air Traffic Controllers Organization (PATCO).

At approximately 11:00 a.m. on August 3, 1981, President Reagan went on national television and radio and stated that all controllers who did not return to work within forty-eight hours had forfeited their jobs and would be terminated.

Each petitioner who did not return to work at a designated time received a notice of proposed removal for allegedly participating in a strike and for unauthorized absence (AWOL). Each notice of proposed removal invoked the so-called crime provision reducing the response period to "within seven days." Each petitioner requested an extension of this seven-day period and the scheduling of oral responses. This request for extension was denied in each of the Petitioners' cases and an oral response was never scheduled.

Subsequent thereto, each Petitioner filed a written response to the proposed removal and each was mailed a notice of termination. Each Petitioner timely filed a notice of appeal to the Merit Systems Protection Board (hereinafter referred to as "MSPB") and a hearing was held before a hearing officer (hereinafter referred to as "presiding official"), on May 19, 21, 24, and 25 of 1982. On October 7, 1982, a decision was rendered by Presiding Official Gail E. Skaggs in which the removal of each petitioner was affirmed.

A Petition for Review was filed with the MSPB and on April 25, 1983, a decision was issued by the Board affirming the terminations. The Petitioners then timely filed a

Petition for Review in the United States Court of Appeals for the Federal Circuit.

On February 24, 1983, the Federal Circuit Court of Appeals issued an Order establishing seven "lead cases" which would be used as vehicles to decide all of the common issues of law affecting the cases of approximately twelve thousand (12,000) air traffic controllers. The case of *Robert L. Campbell, et al. v. Department of Transportation, et al.* was designated as one of these lead cases. Every other appeal pending in the Federal Circuit Court of Appeals involving air traffic controllers was to be held in abeyance pending a decision by the Federal Circuit Court of Appeals. On May 18, 1984, the Federal Circuit Court of Appeals indicated that it would continue to hold all other air traffic controller cases in abeyance pending final resolution of these issues by this Court.

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ARGUMENT

A. Introduction

The "air traffic controller" cases represent the first time that any federal court was faced with a large-scale strike by federal employees. The decisions emanating from the Federal Circuit Court of Appeals in the consolidated "lead cases", in a number of critical ways, create new bodies of law or meaningfully contradict or overrule decisions by this Court or other circuit courts of appeals. The body of law created by the Federal Circuit Court of Appeals will substantially impact the rights, duties, and obligations of federal employees for years to come. The

areas of first impression, the conflicts with prior decisions by this Court and other circuit courts of appeals, and the sheer magnitude and importance of the instant case renders it worthy of certiorari to the United States Supreme Court.

The Petitioners in the "lead cases", including the members of *Campbell, et al.*, raised a number of important common issues. These included: the agency committed error in denying controllers a full seven days to respond to the notice of proposed removal; the MSPB created a new burden of proof, one which shifted the burden of persuasion to the controllers; the controllers were not on strike or AWOL after the presidential deadline of 11:00 a.m. on August 5, 1981 due to confusion over the appropriate deadline for reporting to work; removal is not the mandatory minimum penalty for striking against the United States; the controllers' terminations were tainted by command influence in that high government officials, as opposed to those officials designated by law to do so, made the decision to terminate the controllers; the Petitioners received disparate treatment as compared to those controllers who returned to work prior to their individual deadlines; and the controllers were illegally suspended pending a final decision in their individual cases. A number of these issues will be specifically addressed in the context of this Petition for Writ of Certiorari and the Petitioners, in the instant case, seek review of all these issues.

Along with the common issues discussed above, the Petitioners in *Campbell, et al.* raised, and in fact stressed, three additional arguments:

(a) The changing of the burden of proof and the creation of a new presumption *after* the Petitioners' hearing violated the Petitioners' right to due process of law.

(b) The changing of the burden of proof and the creation of a new presumption, after the Petitioners' hearing and without advance notice or opportunity for comment, violated the Administrative Procedure Act.

(c) The promulgation of advisory opinions by the MSPB violated 5 U.S.C. §1205(g), as well as the Petitioners' right to have a meaningful review of the issues raised in the administrative process.

Despite the fact that counsel for the Petitioners in *Campbell, et al.* was specifically directed by the court to address these three issues in his oral argument, the Federal Circuit Court of Appeals never directly addressed the first two issues enumerated above. In fact, the Administrative Procedure Act is not mentioned in any of the decisions in the "lead cases".

With respect to the advisory opinions issue, the Federal Circuit Court of Appeals side-stepped the issue by making a distinction between the issuance of advisory opinions to the public, and the circulation of advisory opinions to presiding officials within the MSPB. Furthermore, the Federal Circuit Court of Appeals indicated in its decision that there is no evidence that the presiding officials abdicated their responsibility or their independent discretion. The Court ignored the fact that the Petitioners had moved, during the processing of their appeal for a partial remand for the purpose of conducting an evidentiary hearing into the breadth and effect of the advisory opinions, (see Appendix, pp. 66-76).

In addition to the creation of new law and the conflicts with other courts of appeals, the Federal Circuit Court of Appeals' failure to fully address and adjudicate im-

portant issues raised by the Petitioners militates towards review by the United States Supreme Court.

B. The Changing Of The Burden Of Proof And The Creation Of A New Presumption, After The Petitioners' Hearing, Violated The Administrative Procedure Act And The Petitioners' Right To Due Process Of Law.

5 C.F.R. §1201.56 (1979), which is the regulatory codification of 5 U.S.C. §7701, deals with the burden of proof to be applied in hearings before the Merit Systems Protection Board. These sections clearly place the burden of proof on the agency which has taken the adverse action to support same by a preponderance of the evidence. The burden of proof is only placed on a particular appellant with respect to affirmative defenses, (5 C.F.R. §1201.56(b) 1979) and issues of jurisdiction and timeliness of filing, (5 C.F.R. §1201.56(2)).

In the course of adjudicating air traffic controller cases, the MSPB created new rules and standards regarding the burden of proof it would employ in adjudicating specific cases. This new rule or standard, which was first set forth in the case of *Shapansky v. Department of Transportation,* Docket No. DA075281F1130 (October 28, 1982), and was applied to and used as a basis for the decision in the petitioners' case. This occurred despite the fact that the decision by the MSPB in *Shapansky* occurred five months *after* the petitioners' hearing before the presiding official. Therefore, the petitioners had no advance notice or warning that a new burden of proof would be applied in adjudicating their case before the MSPB. The net effect is that the petitioners never had an opportunity to conform their defense to this new burden of proof. This action taken

by the Board not only violates the Administrative Procedure Act, it violates the petitioners' right to the due process of law.

The *Shapansky* case was one of the first controller cases to be decided by the Merit Systems Protection Board. In footnote 2 of that decision, the Board states the following:

> In cases, such as this one, in which the existence of a strike is a matter of general knowledge, the agency may establish a *prima facie* case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike. The burden of persuasion would then shift to the employee to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than intentional participation in the strike. The agency, of course, must ultimately establish appellant's participation by a preponderance of the evidence pursuant to 5 U.S.C. §7701(c)(1)(B).

Id., at 6.

The decision in *Shapansky* was a radical departure from previous case law regarding what must be shown to prove strike participation. See *United Federation of Postal Clerks v. Blount,* 325 F.Supp. 879 (D. D.C. 1971), *aff'd.* 404 U.S. 802 (1971). In fact, despite its best efforts to do so, the MSPB was unable to harmonize the creation of this new burden of proof or new presumption with two cases it had previously decided: *Jones v. Tennessee Valley Authority,* 82 FMSR 7008 (February 19, 1982); *Duckett and Yardley v. Tennessee Valley Authority,* 82 FMSR 7013 (February 29, 1982).

In *Jones and Duckett and Yardley,* which arose out of the same job action, the MSPB held that, based upon the specific facts presented, the agency made a *prima facie* case by showing absence from duty *and* presence among picketers. In the first instance, the MSPB never asserted in these two cases that this standard would be applied to all situations involving strikers. More importantly, it does not create a standard or presumption that mere unauthorized absence from duty during a strike creates a *prima facie* case of voluntary participation therein with the burden of persuasion then shifting to the employee. Therefore, the holding by the Board in *Shapansky,* can only be described as the creation of a new standard or rule regarding burdens of proof and persuasion. In creating this new rule or standard, the Board violated the Administrative Procedure Act in various pertinent parts. Additionally, by creating a new rule and standard to govern the instant case *after* the hearing had taken place, the petitioners' right to due process of law were violated.

Section 551(4) of the Administrative Procedure Act, 5 U.S.C. §551(4) (1982) defines a rule as "an agency statement of general or particular applicability and future effect designed to implement . . . law or policy . . . ". Under 5 U.S.C. §553(b), (c), (d) (1982), an agency must give 30 days notice of a proposed substantive rule and must give interested parties an opportunity to submit written responses. Furthermore,

> "It is fundamental that administrative regulations are void unless they are promulgated in strict compliance with the Administrative Procedure Act, 5 U.S.C. §553."

Rivera v. Patino, 524 F.Supp. 136, 147 (N.D. Cal. 1981). 5 U.S.C. §551 (1982) defines what administrative bodies come within the definition of an "agency" and clearly the MSPB is included within that definition. Finally, although the MSPB may be exempted from the dictates of Section 554 of the A.P.A., 5 U.S.C. §554 (1982), it does come within and is governed by 5 U.S.C. §553 (1982).

An administrative agency may announce new principles either in an adjudicative proceeding or through formal rule-making pursuant to 5 U.S.C. §553 (1982), *NLRB v. Bell Aerospace Company,* 416 U.S. 267, 294 (1974). This Court, however, has indicated a general policy that rule making is preferred to adjudication as a method of announcing new principles and that rule making provisions "may not be avoided by the process of making rules in the course of adjudicatory proceedings". *NLRB v. Wyman-Gordon Company,* 394 U.S. 759, 764 (1969).

Although an administrative agency has the discretion to choose between rule-making and adjudication in the announcing of new principles of law, there are a number of circumstances or situations where courts have required rule-making rather than adjudication. Courts have repeatedly frowned on situations where an agency is changing standards of law and then applying them retroactively in an adjudicatory proceeding. *Ford Motor Company v. FTC,* 673 F.2d 1008 (9th Cir. 1981) *cert. den.,* — U.S. —, 103 S.Ct. 3474 (1981); *United Gas Pipeline Company v. Federal Energy Regulatory Commission,* 597 F.2d 581 (5th Cir. 1979), *cert. den.,* 445 U.S. 916 (1980); *Port Terminal Rail Association v. United States,* 551 F.2d 1336 (5th Cir. 1977); *Precious Metal Associates v. Commodity*

Futures Trading Commission, 620 F.2d 900 (1st Cir. 1980); *Frankl'n v. Shields,* 569 F.2d 784 (4th Cir. 1971), *cert. den.,* 435 U.S. 1003 (1978).

In *Hatch v. Federa' Energy Regulatory Commission,* 654 F.2d 825 (D.C. Cir. 1981), the D.C. Circuit recognized that "the Administrative Procedure Act required that a person involved in an agency adjudicatory hearing 'shall be timely informed of . . . [the] law asserted'." *Id.,* at 835. The Court went on to state the proposition that an agency may not change a standard of law and then apply it retroactively without first giving notice to the parties and affording them an opportunity to introduce evidence which is based upon this new standard. *Id.,* at 835. To act in a contrary manner would violate the Administrative Procedure Act, as well as abridging an individual's right to due process of law.

> " . . . when, as here, the change is a qualitative one in the nature of the burden of proof so that additional facts of a different kind may now be relevant for the first time, litigants must have a meaningful opportunity to submit conforming proof."

Id., at 835.

In *Hill v. Federal Power Commission,* 335 F.2d 355 (5th Cir. 1964) the Fifth Circuit Court of Appeals stated that an agency has a duty "at some stage prior to the close of proof to declare what it considers the relevant standards to be." *Id.,* at 358. To act otherwise, "deprives producers (petitioners) of a fair and adequate hearing because the standards to be applied were neither evolved nor announced until the decision holding them unsatisfied." *Id.,* at 362 (parenthesis added).

In *Aero Mayflower Transit Company v. ICC*, 699 F.2d 938 (7th Cir. 1983), the Seventh Circuit took a similar view by stating:

> "Courts have commonly held that when an agency wants to change a controlling standard and apply it in an adjudicatory setting, parties before the agency must be given notice and opportunity to introduce evidence bearing on the new standard."

Id., at 942.

Although this issue was presented to the Federal Circuit Court of Appeals in the *Campbell* case, both in briefs and oral argument, the only response by the Federal Circuit Court appears at Pages 13-14 of the *Shapansky* decision (Appendix, pp. 27-28). That discussion focuses only on whether earlier case law required active involvement in a strike in order to establish strike participation. (See Argument Section C in which the Petitioners argue that the decision of the Federal Circuit does change existing law.) This discussion ignores the fact that a new evidentiary presumption was created after the completion of the Petitioners' hearing.

Review by this Court is necessary in the instant case to address this issue and give clear direction to courts of appeals regarding whether an agency can create and apply new standards of law after the completion of an individual's adjudicatory hearing.

C. The Holding Of The Federal Circuit Court Of Appeals That Mere Absence During A Strike Of General Knowledge Will Sustain A Finding Of Strike Participation Creates A New Standard Of Law In Conflict With Previous Authority.

In its decision in the *Schapansky* case, the Federal Circuit Court of Appeals adopted the holding of the MSPB that mere absence during a strike of general knowledge will sustain a finding of strike participation. (See discussion in Argument Section B.) This decision is in direct conflict with a body of law that has evolved over a number of years.

In *United Federation of Postal Clerks v. Blount,* 325 F.Supp. 879 (D.D.C. 1971), *aff'd.* 44 US 802, the District Court for the District of Columbia held that only an actual refusal by an employee, in concert with others, to provide services to one's employer is forbidden by 5 U.S.C. §7311(3) and penalized by 18 U.S.C. §1918 (1982). Prior to the Federal Circuit Court of Appeals' decision in the instant case, in order for the agency to sustain its burden of proving that an employee was striking, specific evidence was required that the employee intentionally withheld his services in concert with others. *Tennessee Valley Authority v. Bailey,* 495 F.Supp. 711 (ED Tenn. 1980).

In *United States v. McCubbin,* 81-2059, *et. seq.* (10th Cir. 1983), the Tenth Circuit Court of Appeals, after reviewing evidence nearly identical to that adduced in the instant case, held that the government "must show *concerted,* not just parallel action . . . ." *Id.,* at —.

The decision by the Federal Circuit Court of Appeals upholding the presumption created in the *Schapansky* case eliminates the essential elements of roof required by *Blount, Bailey* and *McCubbin* and impermissibly shifts

the burden of production of evidence to the employee. *Cf. Bonet v. United States Postal Service,* 661 F.2d 1071, 1078 (5th Cir. 1981). See also, *United States v. PATCO,* 524 F.Supp. 160 (D. D.C. 1981); *Young v. Hampton,* 568 F.2d 1253 (7th Cir. 1977).

This conflict between the Federal Circuit Court of Appeals' endorsement of the concept that mere absence during a strike of general knowledge is proof of strike participation and prior cases which require an actual refusal by a particular employee in concert with others creates a great deal of confusion and leaves this area of law unsettled and, therefore, makes this case appropriate for review by this Court.

D. Failure Of The Agency, In Invoking The Crime Provision, To Give The Petitioners A Full Seven Days To Respond To The Notice Of Proposed Removal Renders The Decision "Not In Accordance With The Law" In Violation Of 5 U.S.C. § 7701(c) (2) (C) (1982).

In notices of proposed removal issued to the Petitioners, each individual was informed that he must respond "within seven calendar days after you receive this letter." The term "within seven days" must be interpreted to mean less than seven days, which constitutes a violation of 5 U.S.C. §7513(b)(2) (1982). The Petitioners argued before the Federal Circuit Court of Appeals that that failure to give a full seven days renders the decision by the agency "not in accordance with the law" in violation of 5 U.S.C. §7701(c)(2)(C) (1982). See *Stringer v. United States,* 90 F.Supp. 375 (Ct. Cl. 1950). The Respondents argued that any defect in affording the full notice period must be evaluated using a "harmful error" analysis, pursuant to 5 U.S.C. §7701(c)(2)(A) (1982).

See *Shaw v. United States Postal Service*, 697 F.2d 1078 (F. Cir. 1983). The legislative history regarding the relative applicability of the "harmful error" subsection of 5 U.S.C. §7701(c)(2), 5 U.S.C. §7701(c)(2)(A) and the "not in accordance with law" subsection, 5 U.S.C. §7701(c)(2)(C) is admittedly unclear.

In arguments before the Federal Circuit, the respondents relied on the Senate Report S. 2640, §205, 95th Cong. 2d Sess., reprinted in 2 House Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of Civil Service Reform Act of 1978, 1331 (Comm. Print. No. 96-2, 1979) (hereinafter referred to as "*Leg Hist*", while the petitioners cited passages from the House Report, H.R. Rep. No. 95-1403 95th Cong. 2d Sess. 7 (1978), *reprinted* in 1 *Leg Hist* 636, 644.

In Footnote 3 of its decision in the *Adams* case (Appendix, pp. 40-41), the Federal Circuit Court of Appeals adopts the "harmful error" approach, without even referring to or discussing the *Stringer* decision. In addition to resolving the cases of these petitioners, guidance is needed from this Court regarding the applicable standard to be applied in determining whether an error on the part of a federal agency requires reversal of an agency decision.

E. The Promulgation Of Advisory Opinions By The General Counsel's Office Of The MSPB Violated 5 U.S.C. § 1205(g) (1982).

After a decision was rendered in the instant case by the MSPB, the Petitioners discovered through the Freedom of Information Act that advisory opinions had been issued by the General Counsel's office and had been circulated to presiding officials. After making this discov-

ery, the Petitioners filed a Motion for Partial Remand for the purpose of conducting a hearing in order to determine the effect of the advisory opinions on the decisions issued by presiding officials. (See Appendix, pp. 66-70.) This motion was denied by the Federal Circuit Court of Appeals.

The Petitioners argued that the creation, circulation and incorporation of advisory opinions in the instant case violated 5 U.S.C. § 1205(g) (1982), as well as the Petitioners' due process right to have a meaningful review of the issues raised in the administrative process. The Petitioners cited passages of the decision in their case which were lifted verbatim from the advisory opinions. (See Memorandum in Support of Motion for Partial Remand, Appendix, pp. 70-77.)

In its decision in the *Campbell* case, the Federal Circuit Court of Appeals stated, "The thrust of 5 U.S.C. § 1205(g) appears to be to prohibit the boards from *issuing* advisory opinions to the public, a prohibition comparable to the prohibition against federal courts issuing advisory opinions, and in contrast to other agencies which are authorized to issue advisory opinions as a guide to future conduct." (Appendix, p. 9.) A decision of the Federal Circuit on this point is a matter of first impression which, if allowed to stand, would seriously undermine the purposes behind the promulgation of 5 U.S.C. § 1205(g) (1982).

The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. (1978) established the MSPB to take over the functions of the Civil Service Commission. This change was motivated in large part as a reaction to the perceived defects in the latter agency (see Memorandum in Support

of Motion for Partial Remand, Appendix, pp. 70-77). Section 1205(g) of the Civil Service Reform Act of 1978, 5 U.S.C. 1205(g) (1982) was promulgated to protect the integrity of this new adjudicatory process. The interpretation given to this statutory enactment by the Federal Circuit would significantly undercut its effectiveness, and therefore review by this Court of the Federal Circuit's limiting interpretation is necessary.

F. Removal Is Not The Mandatory Minimum Penalty For Striking Against The United States.

In rendering its decisions in the lead cases, the MSPB held that removal is the mandatory minimum penalty for striking against the United States. The Petitioners raised this issue before the Federal Circuit, which chose not to address the issue head-on. (See *Schapansky* decision, pp. 18-19; Appendix, pp. 31-32.)

The statute in question, 5 U.S.C. § 7311 (1982), reads in pertinent part:

> An individual may not accept or hold a position in the government of the United States or the government of the District of Columbia if he . . . (3) participates in a strike, or asserts the right to strike, against the government of the United States or the government of the District of Columbia. . . .

Clearly, 5 U.S.C. § 7311 (1982) is a penal statute which must be strictly construed against the United States government. 3 *Sutherland Statutory Construction*, § 59.03.

If one is to look at the plain meaning of the statute, it indicates that removal is not mandatory. Section 7311 conspicuously uses the word "may" rather than the more mandatory term "shall". The use of the term "may" dis-

tinguishes § 7311 from other statutory enactments which are mandatory in their approach.

The previous enactment of § 7311 read as follows:

> [n]o person shall accept or hold office or employment in the government of the United States who participates in a strike.

Pub. L. No. 84-330, § 18 p-r, 69 Stat. 624 (1955), *reprinted in* 1955 U.S. Code Cong. & Ad. News 704.

The current phraseology emanates from Pub. L. 89-554, 80 Stat. 378, which was enacted in 1966. Presumably, Congress had an expressed purpose in making this change. It stands to reason that this change from the mandatory language to the discretionary language was intended to give the government more flexibility in dealing with employees who have engaged in strike or strike-related activities. Perhaps, this was the codification or acceptance of the reality that many federal employees have engaged in strike or strike-related activities and not been terminated. In fact, statistics show that between the years of 1962 and 1979, there were 22 work stoppages involving a total of more than 200,000 employees. "Work Stoppages in Government, 1979", *Government Employee Rel. Rep.* (BNA) reference file 71:1011, 1014. This study by the Bureau of Labor Statistics indicates that the government has explicitly, or at least implicitly, recognized and accepted the fact that a penalty less than removal may be applied in cases where federal employees engage in work stoppages or strikes.

This recognition on the part of the government is also reflected in the fact that injunctions obtained by federal agencies in the face of strike activity have regularly in-

cluded "back to work" clauses. For example, see *United States v. Robinson,* 449 F.2d 925, 928, n.6 (9th Cir. 1971); *United States v. Moore,* 427 F.2d 1020, 1022 (10th Cir. 1970); *United States v. PATCO,* 107 LRRM 3210, 3213 (D. D.C. 1981). If § 7311 was to be interpreted in the manner asserted by the Board, then these back to work clauses would be illegal. Furthermore, if the government seriously believed that § 7311 was an absoluate bar to federal employment, it would not have taken the position that air traffic controllers, who had been removed for striking, could apply for employment in federal agencies other than the FAA. See *Federal Personnel Bulletin* No. 731-6. The longstanding interpretation of agencies within the executive branch, that striking employees need not be terminated, is entitled to legal recognition. See *Miller v. Youakim,* 440 U.S. 125, (1975).

In *United States v. PATCO,* 438 F.2d 79 (2nd Cir. 1970), *cert. den.,* 402 U.S. 915 (1971), a case which was litigated in the context of the 1970 sick-out/strike of air traffic controllers, the Second Circuit Court of Appeals stated the following:

> Although [7311] appears to speak in absolute terms . . . there is a substantial question whether this statute must be read in a manner which would require the government to dismiss all controllers and thereby end air travel until replacements could be trained.

Id. at 82 n.3.

In the case of *Miller v. Bond,* 641 F.2d 997 (D.C. Cir. 1981), the D.C. Circuit Court of Appeals implicitly agreed that participation in a strike could be punished less than removal. In that case, the Court stated:

> Though participation in a strike can be grounds for termination of a federal employee, by March 31, 1970,

> the FAA had decided that suspension would be a more appropriate punishment for those who took part in the 1970 sick-out.

Id. at 1000. See also *United States v. PATCO,* 653 F.2d 1134 (7th Cir. 1981), *cert. den.,* 102 S.Ct. 639 (1980).

Finally, in a recent Congressional Research Service Memorandum, Congressional Research Service, Library of Congress, "*The Federal Employee Strike Ban and the Patco Strike,*" 41-45 (February 22, 1982), the following conclusion is stated:

> It does not appear that the underlying purpose of the anti-strike laws, to prevent the interruption of a central government service, would be furthered by construing this statute in such an inflexible manner.

Id. at 44-45.

The MSPB has the final administrative word on the rights, duties and obligations of federal employees. By implicitly affirming the decision of the MSPB on this issue, the Federal Circuit has established removal as the mandatory minimum penalty for strike activities against the United States which stands in conflict with the authority cited above and which therefore necessitates review by this Court.

———o———

CONCLUSION

Based upon the statements and facts discussed herein, the Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

By: */s/* Kenneth H. Stern
1763 Franklin Street
Denver, Colorado 80218
(303) 861-8580

Attorney for Petitioners

84-78

No. _____

In The

Supreme Court of the United States

October Term, 1983

ROBERT L. CAMPBELL, et al.,

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION;
FEDERAL AVIATION ADMINISTRATION,

Respondents.

ON WRIT OF CERTIORARI TO THE FEDERAL CIRCUIT COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

Appeal No. 83-1173

ROBERT L. CAMPBELL, ET AL.,*

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

DECIDED: May 18, 1984

Before MARKEY *Chief Judge,* FRIEDMAN, RICH, SMITH, and NIES, *Circuit Judges.*

NIES, *Circuit Judge.*

This appeal is from a decision of the Merit System Protection Board (board) sustaining the removal of Robert L. Campbell and others by the Federal Aviation Administration (agency) from their positions as air traffic control specialists, Denver Air Route Traffic Control Center (DARCC), Longmont, Colorado. The grounds for removal were striking against the United States and absence without leave. We affirm.

Background

The general facts concerning the background of the strike called by the Professional Air Traffic Controllers Organization (PATCO) and the action taken by President

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* The names of the petitioners in this appeal are listed in the appendix.

Reagan are set forth in *Schapansky v. Department of Transportation, FAA,* No. 83-663 (Fed. Cir. May 18, 1984), and are incorporated herein by reference. Other facts pertinent to the issues considered herein are set out below.

None of the petitioners of this appeal, except Russell S. Root, reported for duty after August 3, 1981. Between August 7 and 19, the Chief of the Denver Air Traffic Control Center, Ralph Kiss, sent a notice of proposed removal to each petitioner after determining that the person had missed his/her deadline shift.

The removal notices each contained the following statement: "[Y]ou may reply to this notice personally, in writing, or both . . . within 7 calendar days after you receive this letter." None of the petitioners made a reply affirming or denying the charges within the seven day period. Each, however, by letter, requested certain materials be sent; requested an extension of time within which to file a reply; and designated Michael Curtis of PATCO, Local 501, as his/her representative.

Kiss responded promptly in writing to each, denying the request for an extension and advising that "your response, if any, must be made in accordance with the letter of proposed removal."

On August 17, Kiss contacted Curtis, the designated representative, and notified him that oral responses could be scheduled by having individual controllers call the Center. No oral reply time was requested by any petitioner or Curtis after that call.

Petitioners were subsequently removed from their positions by the agency. Petitioners appealed to the Denver

Regional Office of the MSPB, where their cases were consolidated. After a 5-day hearing, the presiding official issued a decision sustaining the removals.[1] Petitioners filed a joint petition for review with the full board, alleging numerous errors committed by the agency and the presiding official. The board rejected petitioners' arguments and affirmed the decision of the presiding official.

Issues

Petitioners here put forth positions which are addressed and rejected in other related cases decided today, including:

1. The agency committed error in invoking the crime provision to reduce the notice period to seven days. *See Schapansky,* slip op. at 19-20.
2. Petitioners were denied a full seven days to respond to the notice of proposed removal. *See Adams v. Department of Transportation, FAA,* No. 83-1155, slip op. at n.3 (Fed. Cir. May 18, 1984).
3. The MSPB improperly shifted the burden of proof to petitioners to prove that they were non-strikers. *See Schapansky,* slip op. at 9-11.
4. Petitioners were not on strike or AWOL after the presidential deadline of 11:00 a.m. (E.D.T.)

---

[1] All petitioners were also held to be AWOL. With respect to petitioner Root, the presiding official found that, because he had notified the agency that he was ready, willing, and able to return to work on August 8, his non-duty, non-pay status after that date constituted an improper suspension. Accordingly, the presiding official ordered the agency to amend its records and to place Root in a duty and pay status from August 8 until September 2, the effective date of his removal. The full board agreed that Root had been illegally suspended during this period.

on August 5, 1981, because confusion over the deadline shift rule caused belief that they could not return to work. *See Adams,* slip op. at 4-7.

5. Petitioners received disparate treatment as compared to controllers who returned to work prior to their deadline shift. *See Schapansky,* slip op. at 17.

6. The agency deprived petitioners of the opportunity to decide, up to the last minute, whether they would return to work by failing to inform petitioners of their individual deadlines. *See Adams,* slip op. at 6-7.

7. Petitioners' terminations were tainted by command influence, in that terminations were controlled by decisions of high Government officials, including the President, who usurped responsibilities specifically delegated to the agency. *See Schapansky,* slip op. at 20-23; *DiMasso v. Department of Transportation, FAA,* No. 83-1158, slip op. at 6 (Fed. Cir. May 18, 1984).

8. Petitioners were illegally constructively suspended. *See Adams,* slip op. at 9-11.

9. Removal is not the mandatory minimum penalty for striking against the United States. *See Schapansky,* slip op. at 18-19.

Petitioners also raise the following issues which we address in this opinion:

1. Whether the agency committed error in not scheduling times for oral replies.

2. Whether the MSPB decision was tainted by improper *ex parte* communications and advisory opinions.

In addition, several petitioners raise issues based on the special circumstances of their individual situations, which we also treat below.

Scheduling of Oral Reply Times

Petitioners assert procedural error by the agency in failing to schedule oral reply times. Petitioners contended that it was incumbent on the agency to set a reply time for each petitioner in view of their requests that a specific time be set. As proof of such specific requests, petitioners point to a standard request included in the requests for extension of time: "Please inform me specifically of the time and place such a personal presentation may be made and the date on which my written response is due."

Petitioners argue that since the agency had the names and addresses of all controllers, "it would have been a simple matter to send each of [the striking controllers] a letter scheduling a time for an oral response." Petitioners claim that the telephone call on August 17 from Kiss to Curtis indicating that it was each controller's responsibility to schedule oral presentations "was merely an attempt to correct the previous error that had already taken place, to-wit: the failure to schedule oral response as requested."

As the MSPB held, while the statute and regulations clear provide for a right to make an oral response to agency charges, they do not require the agency to schedule replies *sua sponte*. Rather, it is incumbent on an employee to take the initiative in scheduling the time to exercise that right.

Further, the above-quoted request for scheduling reply times, on which petitioners rely as an assertion of such right, is taken out of context. The opportunity for oral reply actually requested by the letter was *no earlier*

than "20 days from the receipt of [requested] materials." An even later time was requested for written reply. *No request* was made for the agency to receive a petitioner's oral reply within the required seven day period set forth in the notice. Further, as held in *Dorrance v. Department of Transportation, FAA,* No. 83-1175, slip op. at 6-7 (Fed. Cir. May 18, 1984), there was no obligation on the agency to extend the time for reply under the circumstances.

It appears that petitioners turned the scheduling of oral replies into a "cat-and-mouse" game, defeating the purposes intended by the statute in granting such right. The evidence of record indicates that attempts by Kiss to contact petitioners directly by telephone were fruitless. He was unable to reach petitioners' representative, Curtis, at his office and pursued him at home to raise the matter of oral replies. One person to whom he spoke directly refused to make an oral reply "on advice of counsel." We see no bad faith on the part of the agency in these efforts. On the other hand, Curtis had ample opportunity to request reply times within the seven day period and chose not to do so.

Finally, petitioners appear to raise a futility issue with regard to requesting oral reply times, arguing that "it would have been impossible for the agency to accomplish oral responses for all controllers within the time frame prescribed by Mr. Kiss." Kiss, on the other hand, testified that all oral replies would have been heard. We need not consider this hypothetical situation. The fact is that no requests for oral reply times within the seven day period were made.

For the above reasons, we therefore agree with the board that petitioners have failed to demonstrate any

procedural error in the agency's handling of the oral response requests.

The Ex Parte Communications and Advisory Opinions by the MSPB

Petitioners allege the occurrence of improper *ex parte* communications between Special Presiding Official Kenneth Goshorn and agency representative Diane R. [illegible] on February 23-24, 1984. Petitioners' representative notified the board of the communications by letter dated March 7, 1983. After a thorough investigation, the board's Ethics Officer determined that the conversations were procedural in nature, did not relate to the merits of a board appeal, and, therefore, did not constitute a prohibited *ex parte* communication under 5 C.F.R. § 1201.102. The full board concurred in that determination.

Petitioners, in their reply brief, admit that the *ex parte* communications in issue are themselves insufficient to warrant reversal of the board's decision. Rather, they request that the incident be considered along with "other due process violations" that occurred.

The "other due process violations" petitioners delineated are the promulgation of "advisory opinions" by the General Counsel's office of the MSPB. In response to an FOIA request, petitioners obtained copies of legal memoranda which were sent by the board's General Counsel to the board's then Acting Assistant Managing Director for Regional Operations and which were transmitted to regional directors under cover of a memorandum which identified the enclosures as "Advisory Opinions from Office of General Counsel."

Petitioners' contention is that the "creation, circulation and incorporation" of advisory opinions violates 5 U.S.C. § 1205(g).[2] According to petitioners, "[F]or the Board to pre-determine the resolution of a number of legal issues violates [their] right to meaningful review."

In the subject memoranda the General Counsel addressed the issues of:

1. Challenges to the constitutionality of 5 U.S.C. §§ 3333 and 7311(3) and the board's power to pass on constitutional questions.
2. Whether first amendment rights of controllers were violated.
3. Whether disputes over pay, safety, and working conditions justified the strike.
4. Whether violation of 5 U.S.C. § 7311(3) requires removal.
5. Whether presiding officials can take "official notice" of the strike.

The memoranda contain analyses of the pertinent case law and legal commentary and, in some instances, state the author's conclusions. The transmittal memorandum from the Assistant Managing Director advised presiding officials that they were "not obligated" to follow the analysis, stating: "Indeed, presiding officials are responsible for conducting their own research of the issues. . . ."

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[2] 5 U.S.C. § 1205(g) reads:

(g) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. *The Board shall not issue advisory opinions.* All regulations of the Board shall be published in the Federal Register. [Emphasis added.]

We agree with respondent that 5 U.S.C. § 1205(g) does not prohibit the General Counsel from issuing legal memoranda reflecting research into common issues in these proceedings.[3] Indeed, under 5 C.F.R. § 1200.10(c), the primary function of the Office of General Counsel is to provide "legal advice to the Board and its staff," which necessarily includes the Office of the Managing Director and the field offices. That some presiding officials adopted part of the language from the memoranda does not indicate an abdication of their responsibilities or dictation of result by the General Counsel's Office.

In any event, the thrust of 5 U.S.C. § 1205(g) appears to be to prohibit the board from *issuing* advisory opinions to the public, a prohibition comparable to the prohibition against federal courts issuing advisory opinions, and in contrast to other agencies which are authorized to issue advisory opinions as a guide to future conduct. A violation by action of this nature is not asserted by petitioners.

For these reasons, therefore, we affirm the decision of the board that these procedural issues are meritless.

Individual Fact Situations

Russell S. Root

Root was originally scheduled for annual leave from August 1 through August 6, had regular days off on August 7 and 8, and was, therefore, due to return to work on August 9. Before the presiding official, the agency

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[3] In a motion for remand, petitioners appear to concede that the General Counsel's memoranda were not *per se* unlawful but sought remand to determine if some presiding officials were unduly influenced.

introduced a telephone memorandum, as well as the testimony of Kiss, indicating that on August 2, 1981, Root's supervisor, Gutenberg, had called Root's home and informed Root's wife that Root's leave had been cancelled, and that Mrs. Root had agreed to forward the message to her husband.

In a subsequent conversation on August 4, Kiss spoke directly with Root and requested that he return to work but Root said he could not do that. Cancellation of annual leave was admittedly not discussed during this conversation.

On August 8, 1981, petitioner Root called Kiss and requested to return to work on August 9.[4] Kiss refused this request, indicating to Root that he had missed his agency deadline for returning to duty on August 6.

Root asserts that the agency has failed to present any evidence indicating that he actually received word from his wife that his annual leave had been cancelled; moreover, he "does not concede" that the phone call to his wife was even made.[5] He discounts all evidence presented on this issue as hearsay.

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[4] As mentioned in n.1, since Root indicated a willingness to return to work, the board found his suspension to be unlawful, and ordered that he be placed in a duty and pay status from August 8 until his removal on September 2.

[5] Root also argues that his leave was not properly cancelled. The propriety of the agency's cancellation of annual leave is affirmed in *Letenyei v. Department of Transportation, FAA*, No. *83-1174* (Fed. Cir. May 18, 1984). Unlike Letenyei, Root offered no testimony that he was not a striker, so that remand is not appropriate.

The board considered Root's argument but found it unpersuasive. Root never denied receiving the message from his wife. We believe the board was correct in drawing an adverse inference from Root's failure to testify and contest the evidence presented by the agency. *See Adams*, slip op. at 7-9

With regard to Root's hearsay argument, we note that it does not appear that counsel for Root objected to the introduction of the evidence at issue. But, in any event, hearsay evidence is admissible and may be sufficient in board proceedings. *Richardson v. Perales*, 402 U.S. 389 (1971); *Peters v. United States*, 408 F.2d 791 (Ct.Cl. 1969). *See also, Dorrance*, slip op. at 4-5.

David Gold

Petitioner Gold seeks reversal of his removal on the basis of a defective notice of proposed removal. The notice of proposed removal sent by Kiss to Gold on August 18 indicated that he was being charged with striking and with being AWOL beginning at 3:15 p.m. on August 13. At the hearing, Kiss admitted that he had learned subsequently that Gold's Time and Attendance Record, on which he based the notice, was in error and that Gold had, in fact, been on pre-approved spot leave through August 16. The board noted that Gold did not dispute that August 17 was his deadline, and upheld his removal solely on the basis of his failure to report on that date.

Gold claims that because of the "defective" notice of proposed removal, he was given no advance notice of the "real" reason for his termination. Gold points to 5 U.S.C. § 7513(b)(1) which requires an agency to state,

in a notice of removal, "the specific reasons for the proposed action."

Contrary to Gold's view, a notice of proposed removal or removal notice which contains charges which are not sustained is not "defective." An adverse action may be sustained even though not all charges on which the action is stated to be based are sustained. *See, e.g., Pascal v. United States,* 543 F.2d 1284, 1289 (Ct.Cl. 1976). The question here is whether the notice adequately apprised Gold that he would have to defend the charge of striking on August 17, the ground on which the action was sustained. Viewed this way, there is no question but that he was advised that his removal was proposed for participation in a strike against the United States during a period which specifically included August 17. Gold was, thus, well aware that he would be required to explain his absence from the facility on that date and raises here no valid defense to that charge.[6] Proof of one day of striking was entirely sufficient to warrant removal.

We hold that the agency notice supplied sufficient information upon which Mr. Gold could make an "informed reply."

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[6] Before the MSPB, Gold asserted that the strike ended on August 5. However, based on the evidence, the MSPB held that the strike continued at least through August 17, 1981 at the DARCC. Substantial evidence supports that finding. The elimination of some dates did affect the days for which Gold could be charged as being AWOL and receive no pay. No complaint is raised here that he did not receive the amounts due as a result of the correction in his record.

Thaddeus W. Wallace

Petitioner Wallace was on approved annual leave and days off from August 1 through August 12. The agency attempted, but was unable, to contact Wallace to cancel his annual leave. Kiss testified at the hearing that, on August 10, Wallace telephoned his supervisor, Hodges, and stated that he was aware of the strike and would return to work on August 11. Wallace failed to report for work on the 11th or on the 13th, his next scheduled shift after the expiration of his authorized leave. He was charged with strike participation and absence without leave from August 13 through August 19. The MSPB upheld the removal on the basis of his absence on August 13.

As we stated previously with respect to Gold, substantial evidence supports the board's finding that the strike lasted at least through August 17, and Wallace's absence on August 13 is unexplained. We therefore affirm the board's finding that the agency established a *prima facie* case of strike participation by Wallace on August 13.

Wallace's specific argument appears to be that Kiss's testimony could not establish his actual awareness of the strike on August 11. There is no indication that the board relied on this testimony and no explanation by petitioner how exclusion of the testimony would have affected his case.

Conclusion

For the reasons state herein and in the related cases decided today, the decision of the Merit Systems Protection Board affirming the removal of petitioners is *affirmed.*

AFFIRMED

Appendix

ISIAH BAILEY
PETER J. BAKER
RICK W. BAWEK
BARBARA I. BICKFORD
WILLIAM R. COLLIER
DENNIS L. DOWSE
RICHARD B. DUNCAN
STEPHEN G. FINCHER
DAVID GOLD
GILBERT R. GULICK
DAVID C. HARRISON
JOHN F. HAYES, JR.
TIMOTHY F. HIPSHER
FREDERICK L. HOOD
JAMES R. HUME
ROBERT K. KEBARTAS
TERRY T. KELLING
KEITH T. KEMPTER
LESLIE H. KLAHN, JR.
ROBERT E. KOVACH
LAWRENCE J. KRAUSS
JOSEPH J. KREUZER
BRADLEY P. LIGHT
BRUCE C. MEACHUM
DANNY M. MITCHELL
RODNEY P. MICHAELS
TERESA M. MICHAELS
BARTHOLOMEW H. MUNOZ
MICHAEL M. MURPHY
MICHAEL A. NORD
ROBERTS M. O'GRADY
DARRELL G. OTTERSBERG
EDWARD E. PHILLIPS
ROGER E. PRICE
THOMAS A. PUTNEY
SHANNON K. REDDING
RUSSELL S. ROOT
ALFRED SAENZ
JAMES L. SCHILTHUIS
DAVID W. SHALLCROSS
JERRY W. SOUKUP
JAMES T. SPINUZZI
DARRELL L. TAYLOR
PAULA J. VAN DUSEN
ROBERT L. VAN DYKE
PAUL D. VAUGHAN
MICHAEL J. VIOLETTE
THADDEUS W. WALLACE
RICHARD D. WALLER
ROBERT E. WARD
THOMAS G. WEIMER
DEBRA J. WILLIAMS

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

May 18, 1984

ERRATUM

Appeal No. 83-663

Roy L. Schapansky v. Department of Transportation, FAA, Decided:

Please make the following changes:

Page 13, first full paragraph, line 1, insert after *"Transportation"*—*FAA,*—.

Page 15, line 5, delete "No. 83-859, slip op. at 11 (Fed. Cir. Dec. 30, 1983)" and insert after *"Development,"*—724 F.2d 943, 949 (Fed. Cir. 1983).—.

Page 17, first full paragraph, line 6, insert a comma after *"Jones"* and delete "v. *U. S.,*".

Page 18, line 7, correct *"Don"* to read—*Dow*—.
line 10, change *"Patco"* to—*PATCO*—and insert comma after "(7th Cir.)".

Page 20, first full paragraph, line 8, delete *"United States"*.

Page 22, first full paragraph, line 3, delete *"In Re:"*.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-663

ROY L. SCHAPANSKY,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

DECIDED: May 18, 1984

Before MARKEY, *Chief Judge,* FRIEDMAN, RICH, SMITH and NIES, *Circuit Judges.*

MARKEY, *Chief Judge.*

Appeal from a decision of the Merit Systems Protection Board (Board), Docket Number DA075281F1130, sustaining the August 26, 1981, permanent removal of Roy L. Schapansky (Schapansky), by the Department of Transportation's Federal Aviation Administration (agency) from his position as Air Traffic Control Specialist at the Air Route Traffic Control Center in Fort Worth, Texas. We *affirm.*

BACKGROUND

Removal was based on charges of participation in a strike against the United States from August 3 to August 5, 1981, absence without leave for the same period, and

violation of the "loyalty and striking" provision of 5 U.S.C. § 7311.[1] Schapansky appealed to the Board's Dallas Regional Office, which sustained the removal on May 14, 1982. On timely petition for review, the full Board affirmed the presiding official's decision and sustained Schapansky's removal on October 28, 1982.

Presiding Official

The presiding official determined that the agency had established by a preponderance of the evidence: (1) that Schapansky was a member of the union, the Professional Air Traffic Controllers Organization (PATCO); (2) that he was aware of the strike by the members of PATCO; (3) that he intended to and did participate in that strike by refusing, in concert with others, to provide his services to his employer; (4) that the agency did not

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[1] "§ 7311. Loyalty and striking

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he nows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he now asserts the right to strike against the Government of the United States or the government of the District of Columbia."

err in applying the statutory provision of 5 U.S.C. § 7513 (b) (1);[2] (5) that the agency was correct under § 7513(b) (1) in disregarding the requirement for 30 day notice before deciding upon and effecting an adverse action because it had "reasonable cause to believe the employee ha[d] committed a crime" and because 18 U.S.C. § 1918[3]

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[2] Section 5 U.S.C. § 7513 provides, in pertinent part:

"§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date."

[3] "§ 1918. Disloyalty and asserting the right to strike against the Government.

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

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makes striking by federal employees a crime; (6) that once an agency invokes § 7311, removal of the employee is mandatory; and (7) that removal was required to promote efficiency of the service under § 7513(a).

Board

Before the Board, Schapansky reiterated his basic contention that no evidence supported a finding that he had participated in the strike. He conceded that he was absent without leave on August 3, 4, and 5, 1981, and that his absence was a protest against the same conditions that other PATCO members were protesting by withholding their services. Schapansky said other PATCO members were "thinking different", but he viewed his absence as a legal protest and PATCO's "lawyers would take care of it." The presiding official, in finding that Schapansky was aware of and intended to participate in the strike, cited Schapansky's own testimony that he voted "yes" when a "strike vote" was taken by PATCO members on August

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(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he nows asserts the right to strike against the Government of the United States or the government of the District of Columbia;

shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both."

2, 1981, and that the agency had informed him that the strike would be in violation of law. The Board found no basis on which to disagree with the presiding official's finding or assessment of the hearing testimony.

The Board noted that Schapansky in his petition for review neither challenged the presiding official's discrediting of his assertion that he was absent because of harassment and fear for his personal safety, nor asserted any other basis on which his absence might be determined to have been involuntary.

Schapansky challenged the agency's consideration of a photograph showing him among PATCO picketers, saying he is not shown as carrying a sign and that nothing showed him among picketers on August 3 or 4. The Board said that voluntary withholding of services in concert with others, not physical presence on a picket line, constitutes the gravamen of the charge. Schapansky's challenge of the photograph was therefore found unavailing.

On the merits of the basic charges, the Board held that the agency had proved the charges, that Schapansky had not rebutted the evidence of his knowledge of the strike and of his intent to withhold his services along with other PATCO members, and that he had made no showing that his absence was due to any factor other than strike participation.

Objecting to the absence of a 30-day advance written notice, Schapansky argued that he had not been formally charged with or convicted of a crime and that the agency had not proved his intent to do anything illegal. The Board pointed out that it has not adopted criminal charges, convictions, or proof of illegal intent as prerequisites to

a finding of "reasonable cause to believe" that a crime had been committed in support of a decision to disregard the notice provision. The Board went on to say that because § 1918 makes participation in a strike against the United States a felony punishable by up to one year and a day of imprisonment, and because Schapansky's conduct evidenced such participation, it would sustain the finding that the agency had reasonable cause to believe that a crime had been committed and that disregard of the notice requirement was thus permissible under § 7513(b)(1).

Reading § 7311(3) as mandating removal when a charge of striking is sustained, the Board rejected Schapansky's contention that removal was unreasonable. The Board further noted the self-evident gravity of Schapansky's offense in participating in a strike against the Government, that by its very nature such action disrupts the Government's performance of its mission, that it is a criminal offense, that the position of air traffic controller is highly sensitive, the incumbent being directly responsible for the safety of passengers, and that that responsibility entails maintenance of the confidence of his employer and the public who rely on him. The Board viewed a controller's intentional and ongoing abdication of that responsibility, by participating in the strike and by continuing to strike despite the President's 48-hour grace period,[4] as constituting particularly egregious conduct

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[4] At approximately 11:00 a.m. E.D.T. on August 3, 1981, the President of the United States announced:

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which destroyed the controller's unique relationship of trust. The Board therefore held that the agency's removal penalty cannot be deemed excessive, disproportionate, or unreasonable.

Sustaining the finding that removal will promote the efficiency of the service, § 7513(a), the Board determined that § 7311 reflects the belief of Congress that removal of an employee for participation in a strike promotes that efficiency, and that there is a clear and direct relationship of such misconduct to the employee's satisfactory accomplishment of his duties and to the agency's ability to fulfill its mission.

Issues[5]

(1) Whether the Board correctly determined that the agency proved the charges by a preponderance of the evidence.

(2) Whether the penalty of removal was too harsh and unreasonable and should be mitigated.

(3) Whether the removal here was effected with harmful procedural error.

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> This morning at 7:00 a.m. the union representing those who man America's air traffic facilities called a strike.—I must tell those who failed to report for duty this morning they are in violation of the law and if they do not report for work within 48 hours, they have forfeited their jobs and will be terminated.

While more than 1,200 controllers heeded the President's call to return to work; approximately 11,500 continued to strike. 17 Weekly Comp. of Pres. Doc. 845 (August 3, 1981).

[5] Because this and nine other "lead" cases involving air controllers were argued before the same panel on the same day,

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OPINION

(1) *The Charges*

In discussing the issues, the briefs of Schapansky and *amici* cite the language of court opinions dealing with matters and questions totally divorced from those in a case dealing with the propriety of the government's action in removing those who strike against it. We join enthusiastically in the general desire for symmetry in law and procedure, and nothing here said is thought to make a fundamental difference in either (except perhaps for recognition that mitigation is irrelevant when striking is proved, *infra*). Nonetheless, the facts of this case, and the differences between them and those in other types of cases, are such as to render without purpose a discussion here of the many other types of cases cited in the briefs.

The Board properly held that though the agency could establish a *prima facie* case of striking by showing an employee's unauthorized absence during a strike of

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counsel were permitted to present issues which may not have been presented to the Board in the particular case argued by counsel, but which had been presented to the Board in one or more of the lead cases.

Similarly, the court has taken judicial notice, at Schapansky's request, of the materials in his Supplemental Appendix, the Board having considered major segments of that appendix in another lead case.

Briefs *amicus curiae* were received from three sets of counsel collectively representing many hundreds of air controllers whose cases are described by *amici* as likely to be controlled by the outcome in this case. Issues and arguments presented by *amici* in this case are addressed here.

general knowledge and his presence on the picket line, the latter element is not essential, and the charge of striking is proven when it is shown that the employee withheld his services in concert with others, regardless of whether the employee joined a picket line. *See United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879, 884 (D.D.C.), *affirmed*, 404 U.S. 802 (1972). The Board did not, as *amici* assert, accept mere absence during a strike as proof of the charges. On the contrary, as appears below, it took into account all of the facts and circumstances. The Board's decision was not even remotely "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . . " 5 U.S.C. § 7703(c).

The record demonstrates unequivocally that the strike was well and widely known, that Schapansky knew it was illegal to strike against the government, that he knew FAA considered PATCO's "job action" an illegal strike, that his absence was unexplained, that he never attempted to contact the agency to advise it of any reason for his absence, and that under the circumstances his absence constituted evidence of participation in the strike. Proof of a wide-spread strike of general knowledge, together with proof of Schapansky's absence without authorization or explanation during the strike, must in the practical world constitute at least a *prima facie* case of his participation in the strike.

Once an agency has made a *prima facie* showing, the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing. The burden of proving the charge by preponderance of the evidence is and remains throughout

upon the agency. The order of presentation, however, is allocated in such a way that each party is required to give evidence in the area in which it has the better access to information. It may be that little countering evidence would be required, where, for example, the *prima facie* case was minimally supported. We need not discuss that relationship here, however, for the *prima facie* case here was more than minimally supported and Schapansky submitted no evidence effective to counter it.

The agency's burden of proof respecting strike participation may be described as a burden of "persuasion", because it has "in form the affirmative allegation" and must bear the burden of persuasion from start to finish. *See*, 9 J. Wigmore, *Wigmore on Evidence* 2486, 2489 (J. Chadbourn rev. ed. 1981).

Schapansky points to language in the Board's opinion in which it appeared to be placing a burden of persuasion on him. It is clear, however, from a reading of the challenged phrase in the context of the entire opinion that the Board in actuality placed a burden of production, not persuasion, on Schapansky following presentation of the agency's *prima facie* case. The Board specifically stated that it required the agency to "ultimately establish" the employee's participation in a strike. Thus the Board did not, as Schapansky asserts, craft some new approach for use in his case.

Absent effective rebuttal, the agency must be held to have carried its burden of persuasion. Schapansky concedes that the agency demonstrated existence of the strike and his absence during it without authorization or explanation. It is undisputed that Schapansky offered no evidence before the Board that his absence was due

to other factors. Though that state of the record would have been sufficient, the Board noted additional evidence of Schapansky's strike participation (his "yes" vote on PATCO's strike, his presence on the picket line, and his admission that, simultaneously with his fellow union members who were withholding their services, he withheld his in what he called, after the fact, "protest").

Schapansky's argument that the Board ignored the intent element involved in the striking charge is without merit. Before us, Schapansky says his only offense was absence and that he visited the picket line only out of curiosity. The argument ignores the circumstances which give meaning to his conduct. The Board specifically noted that an intent to strike can be proved by circumstantial evidence. Circumstantial evidence can be more persuasive and conclusive than direct evidence. *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325 (1960). The unrebutted *prima facie* case here constitutes such circumstantial evidence. An employee who did not intend to strike could, under the present circumstances, be expected to advise his employer of the true reasons for his absence at the earliest possible moment. If extraordinary circumstances (not here shown) prevented communication with his employer until the employee was mistakenly charged with strike participation, the employee could certainly be expected to explain his absence when (at the very latest) he responded to the agency's proposal to remove him. Schapansky's intent to withhold his services in concert with others is established on this record.

Schapansky is equally incorrect in asserting that proof of the charge requires proof of an employee's spe-

cific intent to implement an agreed plan. Neither participation in strike planning nor express agreement with others to perpetrate the strike is a necessary ingredient of proof that a particular employee participated in a strike. If a requirement for proof of intent resides in 5 U.S.C. § 7311, (and we need not and do not decide that question here) proof of general intent sacrifices. Unexplained absence during a strike of general knowledge establishes that the employee "intended" to strike. The law, like life, recognizes that one may not eat his cake (strike for benefits) and have it too (escape removal when the strike fails by merely denying intent).

In *Moylan v. Department of Transportation*, No. 83-1150, also decided today, the *amicus curiae* argues that the Board's theory of proof announced in the present case denied the controllers due process because it retroactively subjected them to a more onerous burden of proof than the Board previously had applied. The amicus' argument is that the Board's prior standard required proof of active involvement in the strike, such as picketing, to establish a *prima facie* case of striking, and that in Schapansky's case the Board eliminated that additional element of proof.

The *amicus'* argument rests upon an erroneous assumption. There was no earlier rule requiring proof of active involvement in the strike to establish strike participation. Although earlier cases in which strike participation was found involved picketing and other active strike involvement, the Board never held that such activities were an essential element of the proof of strike participation. The Board's decision in the present case did not change the standard of proof necessary to show

strike participation, but merely clarified it. Moreover, although the *amicus* in Moylan argues that the Board's allegedly new standard of proof denied the controllers a fair opportunity to present evidence under that standard, the *amicus* points to no specific evidence that the controllers would have introduced if they had known that the Board would evaluate their cases under that standard. All of the controllers had a due process opportunity before the Board to introduce evidence that they had not participated in the strike, and many took that opportunity.

The charges of absence without leave and violation of 5 U.S.C. § 7311 are supported by the same evidence found to support the charge of striking.

The Board found that the agency proved by a preponderance of the evidence the charges forming the basis for Schapansky's removal. Applying the statutory standard applicable to our review, we hold the Board's decision supported by substantial evidence and not to have been arbitrary, capricious or otherwise not in accordance with law.

(2) *The Penalty*

Sustaining the agency's determination that discharge was an appropriate penalty, the Board declined to rule on whether it had authority to mitigate it. In light of 5 U.S.C. § 7311, it held that dismissal "cannot be deemed clearly excessive or disproportionate to a sustained charge of striking".

Determination of the appropriate penalty is a matter committed primarily and largely to the discretion of the employing agency. *Jones v. United States,* 617 F.2d 233, 236 (Ct. Cl. 1980). Only in the exceptional case, in

which the penalty exceeds that permitted by statute or regulations or is so harsh that it amounts to an abuse of discretion, may its imposition be overturned. *Weston v. U. S. Department of Housing and Urban Development,* No. 83-859, slip op. at 11 (Fed. Cir. Dec. 30, 1983). Whether the court would have chosen a different penalty, had it been making the initial choice, is in the normal case irrelevant. "[P]enalty decisions are judgment calls that should be left to the discretion of the employing agency." *Weiss v. Postal Service,* 700 F.2d 754, 758 (1st Cir. 1983). The penalty here was clearly not disproportionate to the offense.

Striking against the government is a grave offense and a violation of the solemn oath an employee signs, as did Schapansky, as a condition of his employment. Striking, moreover, is a criminal offense. *See Jones, supra,* 617 F.2d at 237. It disrupts the functioning of the government itself. In this case, the inescapable and thus intentional goals of Schapansky and his striking cohorts, absent prompt governmental capitulation, were to inflict harm of the highest magnitude upon the national transportation system, to cause great public inconvenience, to injure the national economy, and to place at risk the public safety. *PATCO v. Federal Labor Relations Authority,* 685 F.2d 547, 622 (D.C. Cir., 1982) (Mackinnon, J., *concurring*). Removal under such circumstances was clearly justified, and the nexus between removal and efficiency of the service is clear.

It is argued that removal of many striking controllers actually injured the air traffic system, which was forced to rely on supervisors and new, rapidly trained controllers. The argument is inappropriate here. Wheth-

er the long range efficiency of the service is better served by capitulation, with its risk of encouraging future strikes, or by a temporary reduction in service while new controllers are trained, is solely a policy choice reserved to the executive branch.

Nothing of record supports Schapansky's assertions that the permanent removal penalty should have been mitigated and that mitigation considerations applicable to other types of charges must be applied here. Schapansky cites the length and quality of his past service. However, the gravity and effects of Schapansky's offense are so great, and the statutes relating to strikes against the United States are so unequivocal, that they do not merely limit the extent of appropriate mitigation; they render mitigation irrelevant. Congress has determined that removal is an appropriate penalty for striking against the government. It is therefore not necessary, as *amici* contend, to remand for a more complete record respecting mitigation factors. An individual with the longest and finest record may be removed when found to have irrevocably sullied that record by participating in the strike at bar against the United States. Long and excellent service creates no license to violate a criminal statute against striking, and to violate one's oath taken on the day of employment that one would not strike. Congress cannot be held to have acted unconstitutionally in enabling the United States to refrain from continuing to employ one who strikes against the federal government; nor can that enablement be impeded by mitigating factors that may be applicable to lesser offenses and different circumstances.

Lastly with respect to the penalty, Schapansky has not shown that his removal should be considered in light of the government's failure to remove those who returned to work during the Presidential grace period or "moratorium." Unevenness in application of a penalty is not a ground for invalidating it, *Jones v. U. S., supra,* 617 F.2d at 238, *Butz v. Glover Livestock Commission Co.,* 411 U.S. 182, 187, 188 (1973). Moreover, the argument relating to returnees does not involve unevenness. Those who returned occupy a status entirely different from that of those who did not. Schapansky could have availed himself of the opportunity (as 1,200 air controllers did), but chose not to do so. The President having established a grace period, no reason exists for considering those who elected to accept the presidential invitation as though they were in the same category with those who disdained it.

Similarly, also, *amici's* reliance on the allegedly less harsh response of the government to earlier and different controller actions (a call-in-sick and a slowdown) which *amici* say the agency considered to have been strikes, is irrelevant. That other government workers have struck and been allowed to return to work, *see Miller v. Bond,* 641 F.2d 997 (D.C. Cir. 1981) and *Benson v. Don,* 520 F. Supp. 231 (W.D. Pa. 1981), or that a court may have viewed it permissible under some circumstances to continue government strikers in employment, *see U.S. v. Patco,* 653 F.2d 1134 (7th Cir.) *cert. denied,* 454 U.S. 1083 (1981), cannot be viewed as forever binding the government against the removal of any striker under any circumstances. Whether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not

be here decided. Removal is permissible under those statutes and no statute prohibits removal of any who strike against the United States. Beyond differing circumstances surrounding earlier events, nothing in the law requires that its enforcement with less than full vigor in the face of one violation of the law binds the government against full and fair enforcement in the face of a later and distinct violation of that law. Ideal justice, and government personnel regulations, envisage equal treatment of persons similarly situated. Whether those involved in earlier events were similarly situated is not here determinable. What is clear is that mercy and compassion, if such were shown in response to earlier and differing infractions, should not be forged into handcuffs restricting the government's response to the present strike of air controllers in 1981.

Similarly, *amici's* strong assertion that the Board disregarded here its own approach to determination of the appropriateness of a penalty, *see Douglas v. Veterans Administration*, 5 MSPB 313 (1981) and *Woody v. General Services Administration*, MSPB Docket No. SF07528110028 (June 2, 1981) is unsupported in the record. That the penalty includes a barrier to reemployment as a controller is not unreasonable in view of the statute, 5 U.S.C. § 7311 ("may not accept or hold a position"), and does not require Schapansky's reinstatement as a controller.

We hold that the penalty here was not arbitrary, capricious, or otherwise not in accordance with law.

(3) *Procedures*

Schapansky says that because his unauthorized and unexplained absence during the strike did not constitute

a "reasonable cause to believe" he had committed a crime, his discharge with less than thirty days notice was procedurally defective.

Section 7513(b) makes the normal 30 days' notice unnecessary when the agency has "reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed." As above indicated, 18 U.S.C. § 1918 makes participation in a strike against the government such a crime. Schapansky's unexplained absence during a well known strike established reasonable basis for the agency to believe that he was engaged in such participation and thereby automatically established a reasonable basis for its belief that he had committed the crime of striking against the government. That a second charge, absence without leave, does not relate to a crime is irrelevant. An agency is not required to wait 30 days to respond to an employee's misconduct when that misconduct is reasonably believed to constitute a crime.

Though Schapansky complains of the lack of 30-day notice, he makes no attempt to demonstrate that the shortened time of notice was harmful. The Civil Service Reform Act specifies that only harmful procedural errors may vitiate an agency action. 5 U.S.C. § 7701(c)(2)(A) (Supp. II 1978). To be harmful the error must substantially impair the employee's rights. *Shaw v. Postal Service,* 697 F.2d 1078 (Fed. Cir. 1983); *Brewer v. United States Postal Service,* 647 F.2d 1093 (Ct. Cl. 1981), *cert. denied,* 454 U.S. 1144 (1982). Nothing of record would indicate that if the shortened time of notice were error (and as above indicated it was not), it impaired Schapansky's rights in any manner.

Schapansky argues that the President's August 3, 1981 announcement was a final decision to discharge him and that the agency's removal proposal did not afford him a meaningful opportunity to reply. *Amici* argue that Schapansky should have been given the right to reply to the President and to demand that the President state his reasons for his action. The argument is without merit.

The President's announcement said those who returned would retain, and those who continued to strike would forfeit, their positions. Some 1200 controllers returned. Having elected to continue on strike, Schapansky could hardly have been surprised when the promised removal notice arrived. There was, contrary to Schapansky's argument, no discharge of Schapansky or of anyone else on August 3, 1981. After August 5, 1981, the agency carefully gave Schapansky all possible opportunities to reply under an entire panoply of rules, procedures, and regulations. Indeed, Schapansky filed three written responses and responded orally. Nothing whatever of record supports Schapansky's implication that he would not have been retained if he had shown a basis for his absence other than participation in the strike.

The President in no manner usurped the authority and responsibility of agency officials to determine whether each individual had continued to engage in the strike after the August 5, 1981 deadline. In view of the need to continue a safe air transportation system for the public, the President's dispensation was, as has been well described, a "grace" period that "worked" insofar as it enabled 1200 controllers to return promptly to maintenance of that system. One who commits a crime by striking against the government can be seen to have done

so from the first moment he withholds his services in concert with others. Schapansky, along with all other striking air controllers, was in this case given a chance to rethink for two days and thereafter was given a full and complete due process opportunity to show that he had not in fact struck against the United States. The President bears a constitutional duty to "take care that the laws be faithfully executed," U.S. Const., Art. II, §3, cl. 4. His action here was directly within his official responsibility, not merely within its "outer perimeter" as was found permissible in *Harlow v. Fitzgerald,* 457 U. S. 800 (1982). The President acted here in a manner obviously calculated to balance the public interest in a continuation of air transportation, immediate enforcement of the law, and an opportunity for violators to reconsider. An argument that the President's grace period somehow denied due process comes with poor grace from one who ignored it.

Schapansky cites decisions in contempt actions against PATCO and individuals for noncompliance with court orders to return to work: *In re: Professional Air Traffic Controllers Organization, Air Transport Association of America v. Professional Air Traffic Controllers Organization,* 699 F.2d 539 (D.C. Cir. 1983); *PATCO v. Federal Labor Relations Authority,* 685 F.2d 547 (D. C. Cir. 1982); *United States v. Phillips,* 525 F. Supp. 1, 8 n. 6 (N.D. Ill. 1981); *United States v. PATCO,* 525 F. Supp. 820, 822 (E.D. Mich. 1981); *United States v. Haggerty,* 528 F. Supp. 1286, 1296 (D. Colo. 1981) and language in opinions accompanying those decisions indicating that return to work was not possible after failure to meet the President's deadline. The citations are irrelevant here.

That Schapansky lacked after his deadline a unilateral authority to simply return to work at will, and could not therefore be held in contempt of a return to work order, bears no relation to whether the procedures applied to his removal were proper. That those procedures were guided from agency headquarters, and spelled out that controllers would be removed *if* it were *proven* that they participated in the strike, speaks for, not against, an exercise of care for employee rights under difficult and unusual circumstances.

Amici assert that the agency's procedures giving Schapansky an opportunity to explain his absence were a "sham" because the agency was "forced" by the President's announcement to fire him. At the same time, *amici* complain that there was disparate treatment because some controllers, having apparently made adequate explanations (described by *Amici as* "settlements"), were not discharged. *Amici* further say: the President's moratorium was an improper exercise of his power to pardon (U. S. Constitution, art. II, § 2 cl. 2); the agency had no power to extend the President's return to work deadline to the first scheduled shift following that deadline; and that the agency failed to notify Schapansky that he would not be removed if he met his next scheduled shift. All of those arguments have been fully considered and found without merit. Lastly, *amici's* assertions concerning the suffering of controllers' families invoke our sympathy; they cannot under the law invoke a reversal.

There is no basis whatever for Schapansky's claim that it was improper for the government to adopt a uniform policy of removing each employee whose participation in the illegal strike was proven, or that that policy

denied Schapansky a full and meaningful opportunity to reply. Schapansky has not in the slightest demonstrated that any agency officials were unreceptive to evidence that the facts supporting the charge were not as alleged, and, as above indicated, mitigation is not an issue. The Court of Claims has rejected the argument that an agency's predetermination to remove an employee if the charges against him were proven is improper. *Pascal v. United States,* 543 F.2d 1284, 1289 (Ct. Cl. 1976). The court there noted that the "crucial point is that the plaintiff has failed to demonstrate that the [agency] would have been impervious if the proof failed to show that the facts were as charged." *Id.*

We hold that the agency's procedures were in accordance with law and that their application involved no harmful error.

DECISION

Accordingly, the Board's decision sustaining the August 26, 1981 permanent removal of Schapansky by the agency from his position as Air Traffic Control Specialist at the Air Route Traffic Control Center in Fort Worth, Texas, is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1155

RICHARD T. ADAMS, et al.,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 83-1156

GARY S. BARACCO,*

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

DECIDED: May 18, 1984

Before MARKEY, *Chief Judge,* FRIEDMAN, RICH, SMITH and NIES, *Circuit Judges.*

MARKEY, *Chief Judge.*

Appeals from decisions of the Merit Systems Protection Board (Board), Docket Numbers NY 075281F0424, DC 075281F0895, sustaining the August 1981 removal of

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*Under Rule 43, Federal Rule of Appellate Procedure, Marjorie F. Baracco, surviving spouse and personal representative of petitioner Gary S. Baracco (deceased), was substituted as a party on motion.

Richard T. Adams, Gary Baracco, and others (Adams) by the Department of Transportation's Federal Aviation Administration (agency) from their positions as Air Traffic Control Specialists. The bases for removal constituted proven charges of striking against the United States and absence without leave. We *affirm.*

Background

The reader of this opinion is referred to this court's opinion accompanying its decision in *Schapansky v. Department of Transportation, FAA,* No. 83-663, (Fed. Cir. May 18, 1984) issued of even date. The discussion in *Schapansky* of facts and issues common to that case and this are adopted and incorporated in this opinion.

Except for instances in which a petitioner is identified by name, "Adams" should be read as applicable to all petitioners in these present appeals.[1]

Issues raised by Adams and *Amici* and differing in substance or detail from those discussed in *Schapansky* are discussed in this opinion.

Unlike Schapansky, petitioners here made no oral response to the notice of removal and were not shown to have voted for the strike. Only Baracco was shown to have engaged in picketing. Each present petitioner received an agency letter proposing removal for strike participation and absence without leave. Each responded only by submitting union (PATCO) prepared forms re-

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[1] Listed in Appendix A are petitioners whose appeals are hereby decided under Appeal No. 83-1155.

questing time enlargements and production of documents. No petitioner denied the charges.[2] No petitioner requested opportunity for oral response, beyond the requests for extension of time to answer "in writing and orally". Nor did any petitioner testify before either the agency or the Board. Other fact differences will appear in the course of discussion on the issues.

Issues

(1) Whether government officials created such confusion concerning the Presidential deadline and controller's ability to return to duty as to have prevented formation of an intent to strike.

(2) Whether the Board properly drew an adverse inference from petitioners' failure to testify.

(3) Whether the agency unlawfully suspended petitioners during agency proceedings by placing them in a non-duty, non-pay status without following the procedures of 5 U.S.C. § 7513.

(4) Whether the Board correctly found that the strike lasted at least through August 19, 1981.[3]

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[2] Adams' assertion that a sentence in one stock PATCO response (challenging any basis for a charge of committing a crime) was a denial of the charges is creative, but unavailing. The sentence was directed at the agency's use of a shortened notice period.

[3] *Amici* want the removals vacated for lack of a 30 day notice, asserting: (1) notice was sent before petitioners were found striking; and (2) 18 U.S.C. § 1918, (making strikes a crime) violates the Thirteenth Amendment. Argument (1) is unfounded. 5 U.S.C. § 7513(b) requires only a "reasonable cause to be-

(Continued on next page)

OPINION

(1) *Alleged Confusion*

Adams' brief contends that the President's announcement and agency actions respecting controllers' ability to avoid removal by returning to work were so confusing that controllers were unable to form an intent to strike. Petitioners have not told the agency, the Board, or this court what their intent was in absenting themselves from work throughout the time of the strike. Nor have they pointed to any evidence upon which anything but an intent to strike may be found, or which might counter the circumstantial evidence establishing an intent to strike.

(Continued from previous page)

lieve" an employee has committed a crime. Argument (2), impressively stated, attempts too much. Nothing in § 1918 compels anyone to work against his or her will. It neither prohibits nor impedes resignations.

Adams, Baracco, and *Amici* say the removal notice provided for reply "within 7 calendar days," thus providing effectively for 6 days, in violation of 5 U.S.C. § 7513(b) (2) (reply in "not less than 7 days"). The argument is semantic and senseless on this record. The Board held the notice itself inclusive of 7 days, though it found harmless error in a letter denying time enlargement to Baracco. Each petitioner responded to the notice within 7 days. In requesting time enlargements, petitioners said they did not think "seven days is a reasonable time". If there were error, it was harmless, no request for an oral reply time having been made within the seven day period. The burden to show harm is petitioners', 5 CFR § 1201.56(b) (1), *Shaw v. Postal Service*, 697 F.2d 1078, 1080 (Fed. Cir. 1983); yet no effort was made to show that any additional reply was or would have been attempted on the seventh day. The argument might be appropriate if the agency had refused to consider a reply filed on the seventh day because not filled "within 7 calendar days." This court does not sit, however, to decide hypotheticals.

The President announced at 11:00 a.m., E.D.T., on August 3, 1981, that controllers then striking who did not report for duty within 48 hours would forfeit their positions and "will be" terminated. Because of differences in shift schedules and time zones, the agency allowed controllers to return to work at the time of regularly-scheduled shifts that began after 11:00 a.m., on August 5, 1981.

The briefs say controllers thought they had been fired when they did not report to work before 11:00 a.m. on August 5, 1981, and thus "could not" take advantage of the permission to return at the time of their first regularly-scheduled shift following that ending of the President's grace period. The argument is disingenuous. First, the President's announcement terminated no one, least of all nonstrikers. Second, petitioners' brief do not explain why they did not, as did 1200 other controllers, report *before* 11:00 a.m. on August 5, 1981, or why they did not notify the agency at any time before their next scheduled shifts that they were not on strike, or why they did not simply report and announce their readiness to work at the time of their scheduled shifts, *if* they had no intention of striking at any of those times.

None of the present petitioners testified that he was confused. Nor is there any evidence whatever that any controller was confused.[4] Apparently recognizing the impossibility of an agency's proving what was in an employee's mind, Adams' brief concedes that intent can be

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[4] The assertion that petitioner Miller did not understand the charges is directly refuted in Miller's letter, the only evidence cited in the briefs as indicating that at least one petitioner was confused.

shown by circumstantial evidence. It makes no effort, however, to blunt the thrust of the view that a controller absent at commencement of the strike, but truly not intending to participate in it, would, promptly upon hearing or hearing of the President's announcement, contact the agency and relieve it of any presumption that his absence was in any manner related to the strike. Petitioners alone knew their true intent.

Nor is there a logical, common sense basis for believing that the President's announcement envisaged an actual, simultaneous "return to work" of 15,000 controllers, or for believing that all non-reporting controllers had been "fired" as of August 5. If any such belief existed, the notice petitioners received of a proposal to remove them and of their opportunity to reply should have disabused them of it. That one having *no* intent to strike would so cavalierly accept the loss of one's job as of August 5, or would fail to inquire, or would fail to report or return before 11:00 a.m. on August 5, 1981, or would fail to report for work at the next scheduled shift, or would fail to explain his absence at the agency proceeding or before the board, simply defies rationality.

The citations of criminal cases, in which proof must meet a beyond-a-reasonable-doubt standard and in which mere proof of absence was found consistent with resignation, *e.g., United States v. McCubbin,* Nos. 81-2059 through 2063, (10th Cir., Aug. 22, 1983); *United States v. Martinez,* 686 F.2d 334 (5th Cir. 1982), are inapt.

Petitioners' argument that the agency had a burden to notify each controller individually that he or she had until the specific time of that controller's next scheduled

shift in which to take advantage of the President's grace period is without merit. Each petitioner knew when his next regularly-scheduled shift commenced and elected not to show up at that time. Having disregarded the initial 48 hour moratorium, petitioners can hardly complain that they were not specifically and personally notified that each had an opportunity to also disregard an extension of that moratorium. There is nothing whatever of record to indicate that any petitioner would have returned or had any interest whatever in returning to work at the time of his next regularly scheduled shift. Nor is there any evidence whatever to indicate that every returning petitioner would have been turned aside. Indeed, the evidence is to the contrary.

Ad hoc speculations of lawyers cannot substitute for evidence of what actually occurred. Though the court has in the rare circumstances of these cases permitted counsel substantial leeway in argument, there must be evidence in the record somewhere in these cases to support counsel's arguments, for this court's decision must be based on a "review [of] the record". 5 U.S.C. § 7703(c).

The argument that confusion prevented formation of an intent to strike is at best unpersuasive.

(2) *The Adverse Inference*

Once the agency had presented evidence of strike participation, it was not improper to draw an adverse inference from petitioners' refusal to testify or otherwise offer rebuttal evidence before the Board.

Adams concedes the propriety of adverse inferences in civil cases when a party is silent in the face of proba-

tive adverse evidence. *See Baxter v. Pa'migiano,* 425 U.S. 308, 318-19 (1976); *Book v. Postal Service,* 675 F.2d 158 (8th Cir. 1982). The briefs say failure to deny the charges is irrelevant because the agency had not presented sufficient adverse evidence. The argument is meritless. The agency had presented before the Board a *prima facie* case of strike participation fully adequate to support the charges in the absence of countervailing rebuttal.

Attacking the presiding official's decision, Adams' brief says failure to rebut the agency's allegations was in that decision considered part of the *prima facie* case itself. Petitioners declined twice, however, to explain their absences, once during the agency removal proceedings and again during the Board hearing. The first failure to deny the charges left those absences unauthorized and unexplained, thereby adding to the sufficiency of the agency's *prima facie* case. It is the Board's decision we review, and petitioners' silence before the Board, after the agency had established a *prima facie* case, fully warranted the Board's drawing of an adverse inference. "Silence is often evidence of the most persuasive character". *United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149, 153-54 (1923).

The judicial process is not entirely divorced from common sense and the everyday experiences of humankind. Petitioners had every reason and incentive to strenuously deny the charge of strike participation *if* they were not in truth strikers. But fear of prosecution for perjury, one may devoutly hope, has not entirely disappeared. The law and experience teach that a striker

can be expected to refrain from falsely testifying under oath that his absence was due to non-strike reasons.

No error occurred in the Board's drawing of an adverse inference in this case.

(3) *Suspension*

Petitioners argue that they should be given back pay because they were constructively suspended during the period between the notice proposing removal and the date of removal.

Petitioners say that *if* they had reported for duty after failing to report after their deadlines, they would not have been permitted to work. Hence, say petitioners, reporting would have been a futile act, and that failure to place them in a non-duty-with-pay status was a constructive suspension. The Board, however, correctly held as a matter of law that petitioners had to show that they were ready, willing, and able to work after their receipt of notice. No such evidence was offered by these petitioners.

When petitioners failed to report to work as scheduled, they were considered absent without leave and were not paid. Like most federal employees, petitioners were not paid for unworked time, unless that time was scheduled as paid leave. Petitioners nonetheless claim entitlement to pay during a time when, through their own volition, they were absent from work without authorization, and during which they gave the agency no reason to believe they wanted to come to work. Choosing to absent themselves, petitioners created a situation in which the agency could not pay them, and at least an ambiguity in

their pay status clarifiable only by action on their part. The view that one need not perform a knowingly futile act may be applicable to strikes in the private sector and to employer-created ambiguities. It is clearly inapplicable here. To order that petitioners be paid under the present circumstances is impermissible in view of long-standing federal pay policy and the necessity of distinguishing between those controllers who chose to report for duty between the receipt of notice and the date of removal and those controllers who, like petitioners, did not.

Petitioners, moreover, bear the burden of establishing the Board's jurisdiction, *Stern v. Department of the Army*, 699 F.2d 1312 (Fed. Cir. 1983), and their failure to establish that they were ready, willing, and able to work during the involved period constitutes a failure to carry that burden. Procedures under 5 U.S.C. § 7513 are inapplicable to "voluntary actions initiated by the employee". 5 CFR § 752.401(c)(3) (1981). *See Taylor v. United States*, 591 F.2d 688 (Ct. Cl. 1979). Non-duty status here was voluntary. It was not agency-enforced or agency-initiated disciplinary action. There was no suspension, constructive or otherwise. *See Armand v. United States*, 136 Ct. Cl. 339 (1956).

The argument based on a constructive suspension theory must fail.

(4) *The Strike Period*

Petitioner Giannattasio was not required to report for work until 11 a.m., August 12, 1981, apparently because he was on annual leave until that time. When he failed

to report, he was served with a notice of proposed removal dated August 12, 1981, charging him with striking as of that date. Giannattasio contended before the Board that the agency had not proved the strike was still in progress on August 12. The Board rejected that assertion, finding that the strike continued at least through August 19, 1981.

It has been said that the agency must prove: (1) that a strike was in progress on the date striking is charged; and (2) that the employee could have returned to work on that date. *Ketcham v. Federal Aviation Administration*, 82 FMSR¶ 7026 (May 28, 1982).

The unrebutted evidence in the present case shows conclusively that the New York Center air traffic controllers were not fired at 11 a.m. on August 5, 1981, and were not locked out at that time. Giannattasio concedes that the agency interpreted the President's August 3, 1981 announcement as permitting air traffic controllers to return to work at the time of their first assigned shift beginning atfer 11 a.m., on August 5, 1981.

There is no evidence in this record that if Giannattasio had attempted to return to work at 7 a.m. on August 12 he would not have been allowed to do so. Indeed, the evidence is to the contrary. As the Board noted, the chief of the New York Center "testified that each of the appellants would have been permitted to return to work prior to the deadline shift with which they were charged with striking." Nor is there any evidence that Giannattasio was removed before August 28, 1981, after he had received the notice of proposed termination and filed a written reply thereto.

The only remaining issue is whether substantial evidence supports the Board's findings that the strike still continued on August 12, 1981, and that Giannattasio's failure to report on that date constituted participation in the strike. There is no doubt that a strike began on August 3, 1981. That strike continued until some event ended it.

There is no evidence that the union terminated the strike before August 12, 1981. Substantial absences continued at the New York Center well into September, as did picketing with signs stating "PATCO LOCAL 201 ON STRIKE" and numerous statements by union officials that the strike of Local 201 was continuing. Neither did the government end the strike before that date by terminating the employment relationship between itself and the controllers. Although the government had begun procedures to remove the controllers by August 12, Giannattasio and many of his fellow controllers were still employees on that date.

Giannattasio relies on pronouncements and press statements of various government officials indicating that the strike ended before August 12, 1981, and on statements in court opinions indicating that the strike ended before August 19, 1981. *See United States v. Haggerty,* 528 F. Supp. 1286 (D. Col. 1981).

The government cites other authority in support of the Board's finding that the strike continued substantially beyond August 5, 1981. *See United States v. Taylor,* 693 F.2d 919 (9th Cir. 1982) (air traffic controller convicted of participating in the PATCO strike on August 8, 1981);

PATCO v. F.L.R.A., 685 F.2d 547 (D. C. Cir. 1982) (holding that strike lasted until November 1981); *United States v. PATCO*, 527 F. Supp. 1344 (N. D. Ill. 1981) (preliminary injunction on November 11, 1981, restricting place and manner of picketing by striking air traffic controllers); *PATCO v. Federal Aviation Administration*, 7 F.L.R.A. No. 10 (Nov. 3, 1981) (supplemental opinion of Chairman noting PATCO had neither disavowed nor attempted to end the strike as of November 3, 1981).

The evidence upon which Giannattasio relies does not undermine the Board's findings that the strike continued until at least August 19, 1981. However government officials may have viewed the strike, the objective facts outlined above support the Board's findings.

We hold that substantial evidence supports the Board's finding that the strike continued at the New York Center at least until August 19, 1981. Our review function thereupon ends.

Petitioners having made no attempt to rebut the foregoing evidence before the Board, Adams' brief suggests before us that the sign-carrying picketers may not have been striking controllers, but "just members of the public merely exercising their first amendment rights." The argument is imaginative but without merit in light of all the evidence.[5]

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[5] An *amicus* in appeal No. 83-1156 chastises the Board for taking "official notice" that a nationwide strike continued through August 6, 1981. The issue does not appear to have been raised before the Board in any of the "lead" cases, by way of petition for reconsideration or otherwise. Because, also, the agency proved Baracco was on strike through August

(Continued on next page)

(5) *Other Petitioners*

Listed in Appendix B to this opinion are other petitioners whose appeals were consolidated for decisional purposes before the Board in *MSPB Docket No. NY0752-81F0424* and who filed individual appeals under the numbers listed. The issues in those appeals appear to have been considered and decided in this or another of the decisions handed down by the court today. Petitioners listed in Appendix B shall notify the court within 14 days of th date of this opinion regarding their intent to withdraw or further prosecute their appeals. Absent notification within that period, the appeals listed in Appendix B will be dismissed. *See Asberry v. U. S. Postal Service,* 692 F.2d 1378, 215 USPQ 921 (Fed. Cir. 1983).

DECISION

Accordingly, the Board's decisions sustaining the removal of petitioners in Appeal Nos. 83-1155 and 83-1156 are *affirmed.*

AFFIRMED

(Continued from previous page)

7, 1981, because Baracco made no effort to refute the facts noticed, see *Ohio Bell Telephone Co. v. Public Utility Commission,* 301 U.S. 292 (1937), and because the Board did not deny petitioners their due process right to establish the nonexistence of a strike at their location or their nonparticipation as strikers, the issue is inappropriately argued here.

Appendix A

Petitioner	MSPB Docket No.	Court Docket No.
Richard T. Adams	NY075281F0424)	
	)	
Richard J. Bender	NY075281F0435)	
	)	
Richard Bronleben	NY075281F0454)	
	)	
Antonio Chevalier	NY075281F0477)	83-1155
	)	
Thomas R. Connelly	NY075281F0486)	
	)	
Thomas J. Contegni	NY075281F0488)	
	)	
Gerard Curran	NY075281F0500)	
	)	
James N. Fry	NY075281F0548)	
	)	
Allen Giannatasio	NY075281F0556)	

Appendix B

Petitioner	MSPB Docket No.	Court Docket No.
Raymond Miller	NY075281F0671	83-1159
Edward Rocks	NY075281F0748	83-1160
William Amodeo	NY075281F0430	83-1162
Robert Biancamano	NY075281F0439	83-1163

Bruce Bonacum	NY075281F0442	83-1164
John Brunner	NY075281F0457	83-1165
Richard Burns	NY075281F0460	83-1166
Kenneth Carlstrom	NY075281F0469	83-1167
William Cecil	NY075281F0473	83-1168
Charles Contegni	NY075281F0487	83-1169
Charles Darcy	NY075281F0507	83-1170
Wayne Ennis	NY075281F0531	83-1171
James Finnegan	NY075281F0538	83-1172
Gary Dawson	NY075281F0509	83-1176

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1155

RICHARD T. ADAMS, et al.,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

Appeal No. 83-1156

GARY S. BARACCO,*

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

NIES, *Circuit Judge,* concurring.

I join in the majority opinion and write only because I see a need for treatment of the issue of harmful error to a greater extent than it has been given in note 3 of the majority opinion.

The *Baracco* appeal is the lead case on interpretation of the harmless error provision found in 5 U.S.C. § 7701 (c)(2)(A) vis-a-vis the statutorily mandated time period for reply to the notice of proposed removal. Baracco asserts that he was given only 6 days to reply, but for reasons not discussed in the majority opinion or pertinent to other controllers.

Baracco was sent the same notice as other controllers. Thus, under the majority decision here, he was initially given a 7-day notice period. The notice was mailed August 7 by regular mail with a duplicate sent the same day by certified mail. Since Baracco did not testify, we do not know when he received the notice by regular mail which,

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*Under Rule 43, Federal Rules of Appellate Procedure, Marjorie F. Baracco, surviving spouse and personal representative of petitioner Gary S. Baracco (deceased), was substituted as a party on motion.

if before receipt of the certified mail, would have started the running of the reply period. In any event, he signed for the certified mail on August 11. In an undated letter from Baracco to the agency received August 14, he requested an extension of time to file written reply on the ground that "seven days" was not a reasonable time for filing a response. At that time he knew he had 7 days, as the MSPB found. In reply, the agency denied "an extensio nof time to submit a written reply beyond the seven day period." Had the agency letter stopped there, Baracco would have no basis for argument that he is in a different situation from others. However, in the same letter, the agency stated that the written response was to be submitted "prior to August 18, 1981, the expiration of the seven day notice period."

Treating this as arguably creating an ambiguity as to the final date for reply, the presiding official ruled that Baracco would have had to show, in any event, that a 6-day reply period was harmful error, that is, that the error might have affected the outcome of the case. Since Baracco had made a written reply within 7 days and offered no evidence at any time of individual circumstances which might have changed the outcome, the presiding official ruled that Baracco failed to show harmful error. The board agreed that Baracco was required to show that the asserted procedural error was harmful.

Baracco's position is that harmful error should not have entered into resolution of the issue of the shortened notice period. Baracco maintains that his right to a minimum 7-day reply period, unquestionably required by 5 U.S.C. § 7513(b) (2), rendered the action "not in accordance with law" within the meaning of 5 U.S.C. § 7701(c)

(2) (C), set out below, and that, therefore, reversal is required. In essence, Baracco argues that a statutory procedural requirement is not subject to the harmful error provision of 5 U.S.C. § 7701(c) (2) (A). Stated another way, violation of a statutory procedural requirement is harmful *per se*.

The statutory provisions under consideration here read in pertinent part:

> 7701(c) (2) [T]he agency's decision may not be sustained . . . if the employee . . . —
>
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision.
>
> • • •
>
> (C) shows that the decision was not in accordance with law.

The MSPB carefully reviewed the statutory history of the Civil Service Reform Act of 1978, Pub. L. No. 95-45[illegible], 92 Stat. 1111 (1978) (Reform Act) to discern the relationship of these two provisions and found no clear guide to their interpretation. However, it found direction, in favor of the presiding official's ruling, in the numerous expressions of concern during hearings on the Reform Act about unnecessary procedural reversals of agency actions.[1]

In rejecting Baracco's argument, the board also found guidance in the need to give effect to all parts of the

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[1] *See Hearings Before the Senate Committee on Governmental Affairs on S. 2640, S. 2707 and S. 2830,* 95th Cong. 2d Sess. 22, 43, 101, 146 (1978); *Hearings Before the House Committee on Post Office and Civil Service on H.R. 11280,* 95th Cong., 2d Sess. 31, 122-23 (1978).

statute. The board reasoned that procedural regulations have the force of law and that, if the harmful error provision could not be applied in connection with procedures established by statute, by the same token, it could not be applied to procedures established by regulations which have the force of law. Therefore, the statutory provision on harmful error would be meaningless.

The board then reviewed and reconciled its own decisions with its holding here, and, finally, found support for its interpretation in precedent of this court, particularly, *Doyle v. Veterans Administration*, 667 F.2d 70, 72 (Ct. Cl. 1981); *Brewer v. U.S. Postal Service*, 647 F.2d 1093, 1097 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 1144 (1982) and *Shaw v. U.S. Postal Service*, 697 F.2d 1078 (Fed. Cir. 1983). For example, as stated by Senior Judge Cowen in *Brewer*, the first case reviewed by the Court of Claims under the Reform Act:

> In enacting the Civil Service Reform Act of 1978, Congress declared that this court should reverse agency actions for procedural error "only if the procedures followed substantially impaired the rights of the employees." S.Rep.No. 969, 95th Cong., 2d Sess. 64, *reprinted in* [1978] U.S. Code Cong. & Ad. News 2723, 2786.

647 F.2d at 1097.

In support of the contrary position, petitioner cites cases, for example *Ryder v. United States*, 585 F.2d 482 (Ct. Cl. 1978) and *Washington v. United States*, 147 F. Supp. 284, (Ct. Cl.) *cert. denied*, 355 U.S. 801 (1957), which are clearly no longer controlling in view of the addition to the statute of the harmful error provision.

Turning again to the precise language of the statute, I conclude that paragraphs (A) and (C) are directed at

different evils. Harmful error in procedures (paragraph A) raises the question: Did the wrongful procedure harm the employee in the presentation of his defense so that a different result might have been reached? Petitioner here has not asserted such harm. He asks simply for a *per se* rule. That is not a "showing" of harm as the statute requires. Paragraph (C), on the other hand, is directed *to the decision* itself. Was the decision in its entirety in accordance with law? Since the harmful error rule is part of the law, the question becomes: Is the decision in accordance with the law including the harmful error provision? Tested against this standard, the *Baracco* decision cannot be reversed since no harmful error has been shown.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1175

BERNARD DORRANCE,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

DECIDED: May 18, 1984

Before MARKEY, *Chief Judge,* FRIEDMAN, RICH, SMITH, and NIES, *Circuit Judges.*

RICH, *Circuit Judge.*

This appeal is from the April 25, 1983, decision of the Merit Systems Protection Board (Board) sustaining the removal of Bernard Dorrance from his position as Air Traffic Control Specialist by the Department of Transportation's Federal Aviation Administration (agency). The bases for the removal were proven charges of striking against the United States and absence without leave. We affirm.

Background

Dorrance was employed as an air traffic controller at the New York Air Route Traffic Control Center, Ronkonkoma, New York. On August 3, 1981, the Professional Air Traffic Controllers Organization (PATCO) commenced a nation-wide strike against the agency. Dorrance failed to report for duty as scheduled at 3 p.m. on August 3, 1981. By letter of August 6, the Chief of the air traffic center notified Dorrance that he was charged with striking against the United States Government and with being absent from duty with authorization, and was apprised of his proposed dismissal. In a letter of August 10, Dorrance requested an extension of time in which to file a written response to the charges. By separate letter on that date, he also requested certain material relevant to the agency's proposed action, under the Freedom of Information Act. A third letter by Dorrance on August 13 noted that "because of ambiguities in the notice and the statutes that apply, I cannot deny or affirm the charges at this time."

The request for an extension of time was denied by letter of August 12, and, by letter of August 19, the center's Chief, Louis C. Pol, dismissed Dorrance effective

August 22, 1981. Dorrance appealed to the Board and, after a hearing, a Presiding Official sustained the agency's removal, as did the Board on petition for review in *Adams et al. v. Department of Transportation* (Docket No. NY075281F0424, April 25, 1983). Dorrance did not deny the charges against him at any stage of these proceedings, nor did he elect to testify during the hearing before the Presiding Official.

More details concerning the air traffic controllers' strike are set forth in related cases decided concurrently herewith: *Schapansky v. Department of Transportation*, No. 83-663 (Fed. Cir. May 18, 1984); and *Adams v. Department of Transportation*, 83-1155 (Fed. Cir. May 18, 1984).

Issues

Dorrance challenges the agency's removal action on several grounds, principally, (1) the agency failed to meet its burden of proof that he participated in a strike; (2) the agency erred by invoking the "crime" provision of 5 U.S.C. 7513(b) to shorten the advance notice period to Dorrance before his dismissal; (3) that his removal does not promote the efficiency of the service; and (4) that the penalty of removal is grossly disproportionate to the nature of the offense. Such issues were raised in *Schapansky*, supra, and Dorrance's appeal on these grounds is rejected for the reasons set forth in *Schapansky*.

Dorrance further contends that (5) the Presiding Official erred in drawing a negative inference from Dorrance's failure to testify in his own behalf. This argument is unavailing. Silence added to the sufficiency of the agency's case when it follows the agency's establish-

ment of a prima facie case, as discussed in our decision in *Adams*, supra.

Additional arguments by Dorrance for reversal of the Board's decision are: (6) the Presiding Official improperly relied upon hearsay evidence, i.e., the Time and Attendance Reports of the agency used to corroborate Dorrance's absence from work on August 3, 1981; (7) the harmful effect of consolidating Dorrance's case with those of 63 other air traffic controllers before the Presiding Official; (8) the harmful effect of the agency's denial of Dorrance's request of August 10 for an extension of time; (9) the violation of due process represented by alleged "dilatory" tactics of both the agency and the Presiding Official; and (10) that the agency prevented his return to work.

OPINION

Initially, we note that our standard of review for decisions of the Board is prescribed in 5 U.S.C. 7703(c).[1]

The Presiding Official heard the testimony of Chief Pol, and noted that he identified schedules, logs, and time and attendance records which documented, inter alia, the

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[1] 5 U.S.C. 7703(c) provides in pertinent part:

> (c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence; . . .

absence of Dorrance commencing on August 3, 1981. Dorrance contends that the unsupported testimony of the Center Chief is not sufficient to prove that he was striking, and that these various records are hearsay and also ineffective because of evidentiary deficiencies such as a lack of testimony as to their accuracy or the manner in which they were made and maintained.

As explained in *Schapansky*, proof of a wide-spread strike of general knowledge, together with Dorrance's absence without authorization or explanation during the strike constitutes at least a prima facie case of his participation in the strike. Dorrance neither denied his absence nor the existence of a strike; nor does he argue that he objected to Chief Pol's testimony or documents relied upon therein at the time of the hearing. The Board found that the unrebutted testimony of Chief Pol was sufficient to establish a prima facie case of striking. Furthermore, the documents appear probative and would be competent evidence though hearsay before the Board in any event. *See, e.g., Borinkhof v. Department of Justice*, 5 MSPB 150, 153 (1981); and *Brewer v. United States Postal Service*, 647 F.2d 1093, 1097-98 (Ct. Cl. 1981); *cert. den.*, 454 U.S. 1144 (1982).

Dorrance next claims that the consolidation of his case along with 63 "other appeals on one day" was harmful error, and violated his due process rights to a fair hearing.[2] Dorrance admits that the Presiding Official has

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[2] 5 U.S.C. 7701(c) (2) provides that the Board may not sustain an agency decision "if the employee . . . (a) shows harmful error in the application of the agency's procedures in arriving at such decision; . . . ."

discretion to consolidate appeals under 5 U.S.C. 7701(f); however, he contends that this consolidation "rendered the hearing a sham" and "chilled and reduced his opportunity as a matter of law, to introduce evidence in his own defense." This contention is at best disingenious because Dorrance did not object to the consolidation until now, and because he made no attempt to introduce evidence in his own defense. The consolidated appeals involved substantially the same issues and questions of fact and the same counsel represented all of the appellants. Furthermore, the one controller who did present an individual defense, Mr. Copping, was singled out for separate treatment in the Presiding Official's decision. Dorrance has not shown any harm to his opportunity to defend himself nor that this consolidation was an abuse of the Presiding Official's discretion.

The agency denied a request by Dorrance in his letter of August 10, 1981, for an extension of the time in which to respond to the charges set forth in Chief Pol's letter of August 6, 1981. This request was based on three reasons: (1) the agency improperly decreased the statutory thirty days advance notice of removal on the ground that he had committed a crime; (2) even if the crime exception is invoked, he is entitled to a reasonable time to reply and the seven days granted was not reasonable; and (3) he needed time to view materials that the agency relied upon to support its proposed removal as well as other documents requested under the Freedom of Information Act (FOICA). The first two contentions were rejected in *Schapansky* and *Adams*, supra. In its letter of August 12, the agency rejected the request for extension but addressed only part of Dorrance's third reason, noting that

the material requested under the FOIA had not been relied upon by the agency for the proposed action.

On appeal here, Dorrance argues that extension requests "should be liberally granted," and that had "he received the extension of time, he very well may have replied to the proposed dismissal." Dorrance thus contends that lack of documents and lack of response time precluded an opportunity to make a meaningful response. The Board ruled that the wording of the August 3 notice of proposed dismissal did not lack sufficient particularity as to the charges against him. We agree. *See Anderson v. Department of Transportation,* No. 83-1153 (Fed. Cir. May 18, 1984). Dorrance attributes harmful effect to this denial, but he has not shown that the agency's decision precluded a meaningful response to the charges. The mere allegation of harm is unpersuasive.

Dorrance contends that the agency engaged in dilatory tactics during the course of proceedings, including failure to meet certain deadlines and to respond to certain of his motions and requests, and that this violated his due process rights. Indeed, Dorrance moved for sanctions against the agency, but these were not granted by the Presiding Official. Dorrance contends that it was "a gross perversion of justice for, on [the] one hand to hold that petitioner could not have more than seven days to respond to the charges; but on the other hand, to essentially give respondent all the time it required. . . ." The Board held that, absent a showing that the Presiding Official had abused his discretion, his determinations will not be found to constitute reversible error. To be "harmful error" necessitating our reversal of the Board, the error must substantially impair an employee's rights.

Brewer, supra; *Shaw v. United States Postal Service,* 697 F.2d 1078 (CAFC 1983).

The Board considered the special circumstances of this strike in which approximately 11,000 related air traffic controller "appeals can and should be recognized." Notwithstanding agency delays the Board concluded that the Presiding Official's management of the case and the agency's conduct were not shown to have caused any "prejudicial harm to appellants' presentation of their cases." On appeal to this court, Dorrance has demonstrated no such harm to his rights, and we find no deprivation of due process.

Finally, Dorrance urges reversal of the Board on the ground that he was effectively "locked out" of the Air Route Traffic Control Center and prevented from returning to work. This contention is based both on an announcement by Chief Pol over the public address system on August 5, 1981, at 11 a.m., that any air traffic controllers then outside the facility who wanted to report for work would be escorted into the facility, and upon President Reagan's announcement, 48 hours earlier, that controllers who had not reported for work within 48 hours would be fired. Chief Pol testified that the gates were not locked at the time of the announcement. The Board found that, "Viewed in a light most favorable to appellants, the most that can be found from these circumstances is that anyone within hearing distance of the announcement (which appellants do not claim to have been) was specifically informed not that he or she could not return to work, but rather that he or she could."

The Board also found that it was incumbent upon the individuals removed from service to seek "any necessary

clarification" as to the actual time of the deadline for their return to work. Additionally, the Board found that any perceived futility in attempting to return to work did not relieve them from attempting to contact the facility. The Board's holding that Chief Pol's statements did not serve to "lock out" Dorrance was supported by substantial evidence.

Summary

We hold that the agency's procedures were in accordance with the law and that its actions and those of the Presiding Official involved no error. Accordingly, for reasons stated herein and in the related cases decided today, the Board's decision sustaining the August 22, 1981, permanent removal of Dorrance by the agency from his position as Air Traffic Control Specialist at the New York Air Route Traffic Control Center is *affirmed.*

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1173

ROBERT L. CAMPBELL, et al.

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION; FEDERAL AVIATION ADMINISTRATION

Respondents.

MOTION FOR PARTIAL REMAND

COMES NOW the above named petitioners, by and through their attorneys, KARP, GOLDSTEIN & STERN, and moves this court to enter its Order remanding, in part, the instant appeal to an appropriate Administrative Law Judge to conduct evidentiary hearings, as described below, and as grounds therefore states the following.

1. Section 5, U.S.C. §1205(g) of the Civil Service Reform Act of 1978, states that the Merit Systems Protection Board (hereinafter referred to as "Board"), shall not issue advisory opinions.

2. On February 1, 1983, after having received information regarding the existence of advisory opinions, Mr. Rex B. Campbell, the former representative of the above named petitioners (hereinafter referred to as "Representative Campbell") filed a Freedom of Information Act request with the Denver Regional Office of the Board. In response to this request, Mr. Jack B. Toll, Regional Director of the Board, supplied Mr. Campbell with a number of documents that had not been previously provided during the course of the Pre-Hearing and Hearing proceedings in the instant case. The documents in question contain legal opinions regarding a number of the major issues to be adjudicated in the former air traffic controller cases. These legal opinions are preceeded by a cover memorandum which describes these documents as "Advisory Opinions from Office of General Counsel" (the Freedom of Information Act response, the cover memorandum, and the advisory opinions are attached hereto as Exhibit A). At this point in time, the undersigned has no way of knowing whether there are other documents or communications,

either written or oral, which could be described as "advisory opinions" which were not contained in the response to the aforementioned Freedom of Information Act request.

3. After receiving the above-described advisory opinions, Mr. Campbell filed a motion with the Board entitled "Violations of 5 U.S.C. §1205(g)". (This motion is attached hereto as Exhibit B).

4. At footnote 19 of its Opinion and Order in the instant case, the Board states that the above-described advisory opinions do not constitute a violation of 5 U.S.C. §1205(g). This aspect of the Board's decision contained a number of factual statements that the petitioners are unable to evaluate or contest without the granting of this Motion for Partial Remand.

5. The petitioners concede that the possibility exists that the manner in which the attached advisory opinions were created, distributed, and incorporated in specific decisions does not violate either 5 U.S.C. §1205(g), or the petitioners' right to the due process of law. It is equally possible, however, that the use of the advisory opinions does constitute such a violation (See attached Memorandum). It is clear, therefore, that this issue cannot be fairly adjudicated and resolved without affording the petitioners an opportunity to develop the record on this point. This would require taking the testimony of Presiding Official Skaggs; Jacqueline R. Bradley, Assistant Managing Director for Regional Operations who circulated the advisory opinions; Evangeline W. Swift, who authored the opinions; and, perhaps other Board employees who were involved in the decision to create and

distribute said opinions. The testimony would focus on the circumstances surrounding the creation and distribution of the advisory opinions and their affect on Presiding Official Skaggs and her interim decision in the instant case.

6. With respect to the procedure to be employed in connection with this Motion, petitioners would recommend that this court retain jurisdiction of this appeal and remand it, in part, to an Administrative Law Judge to conduct a hearing regarding the issues raised herein. It is further recommended that an Administrative Law Judge should be chosen who has had no connection to any of the former air traffic controller cases.

7. It is the petitioners' hope that the hearing pursuant to the partial remand could be held as expeditiously as possible and would *not* interfere with the briefing and oral argument schedule to be imposed by this court.

WHEREFORE, the petitioners respectfully request that this Court enter its Order remanding, in part, the above captioned appeal, to the appropriate authority for the scheduling and conducting of an evidentiary hearing on the development, distribution, and use, of the attached advisory opinions.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY: /s/ Kenneth H. Stern
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CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing Motion for Partial Remand by placing same in the United States mail this 6th day of July, 1983, postage pre-paid and properly addressed to:

Lorraine B. Halloway
Department of Justice
Civil Division, Commercial Litigation Branch
Washington, D.C. 20520

/s/ Nancy Thienes

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1173

ROBERT L. CAMPBELL, et al.

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION; FEDERAL AVIATION ADMINISTRATION

Respondents.

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL REMAND

COMES NOW the above named petitioners, by and through their attorneys, KARP, GOLDSTEIN & STERN, and submit the following memorandum in support of their Motion for Partial Remand:

I. BACKGROUND

In October of that year, the U.S. Congress passed the Civil Service Reform Act of 1978. The Act created

the Merit Systems Protection Board (hereinafter referred to as "Board") to assume the adjudicatory functions that had previously been handled by the United States Civil Service Commission. To a large extent, the Board:

> Emerges as an adjudicatory agency explicitly established against preceived defects in the adjudicatory functions of the Civil Service Commission.

Vaughn, The Opinions of the Merit Systems Protection Board: A Study in Administrative Adjudication, 24 AD.L.R. 25 (1980). See also *Guttman, A Development and Exercise of Appellate Powers in Adverse Action Appeals,* 19 A.M.U.L.R. 323 (1970); *General Accounting Office, Design and Administration of the Civil Service Commission's Adverse Action and Appeals Systems Need to be Improved,* B-19810 (1970); *Vaughn, The Spoiled System: a Call for Civil Service Reform* (1975). Even the legislative history reflects Congress' concern that an adjudicative body be created that is above reproach 1978 U.S. Code Cong. and Adm. News pp. 2723, 2727-2729:

> There is little doubt that a vigorous protector of the Merit System is needed. The lack of adequate protection was painfully obvious during the Civil Service abuses only a few years ago.

Id. at 2729.

In recognition of the adjudicatory shortcomings of the U.S. Civil Service Commission, Congress created, in the form of the Board, a more formal, quasi-judicial body that has been endowed with a high level of due process rights. One aspect om this new, formal adjudicatory process was the explicit prohibition against the issuance of advisory opinions. 5 U.S.C. §1205(g).

In the Act, Congress commands the Board to promulgate regulations that are consistent with the concerns and mandates contained therein. In conjunction with the publication of their final rules, the Board underscores this clear mandate from Congress. In response to a large number of comments criticizing the Board's proposed rules as being "too legalistic" the Board makes the following observation:

> Based on a careful analysis of the legislative history of the Act, it is the Board's position that Congress intended it to function it as a quasi-judicial agency and therefore it is essential that formalized procedure be implemented to process cases. This is particularly necessary given the Congressional mandate that employees receive full due process rights in the adjudication of their appeals. Accordingly, it was necessary to set forth required standards and procedures in some detail.

44 F.R. No. 127 at 3834 (June 19, 1979).

In promulgating its regulations, as mandated by statute, the Board created the office of "Presiding Official". Presiding Officials were intended to be independent hearing officers who would conduct pre-hearing and hearing proceedings, consider and make rulings regarding evidence adduced at the time of hearing, and make independent determinations regarding the law and facts to be applied in a given case. See 5 C.F.R. §§ 1201.4, 1201.41, and *Weaver v. Department of Navy,* 2 MSPB 297 (1980).

The Board, itself, has often underscored the necessity for strong, independent presiding officials. In a recent proceeding before the Federal Labor Relations Authority, the Board filed a brief opposing a move by presiding

officials and attorneys in the General Counsel's Office and the Office of Appeals to form a single bargaining unit. *MSPB* v. *MSPB Professional Association*, No. 3-0103. In the Board's brief in opposition to this move, it makes the following strong policy statement:

> While the agency recognizes that the proposed unit employees do share common general personnel policies and practices, the agency is also compelled to establish and maintain the highest standards of integrity due to its role as an adjudicating body. This principle clearly requires the agency to insulate itself from the preception of an inherent conflict of interest. *The establishment of a regional system with no review by the Board members prior to the issuance of an initial decision, was designed to institutionalize the independence of presiding officials.*

Id., MSPB Brief in Opposition (Emphasis added).

One leading commentator, in an important law review article, discusses the significance of having presiding officials conduct hearings as opposed to Administrative Law Judges. In response to the suggestion that presiding officials may be more suceptible to the abuses found in the United States Civil Service Commission, this commentator states the following:

> Too much can be made of this distinction. The Board benefits by insulating its presiding officials from intervention of the Board in pending cases other than through proper adjudicatory procedures. The sense of independence given to presiding officials protects them and enhances the reputation of the Board. The regulations of the Board limit the involvement of officials of the Board other than through review authority (Footnote omitted).

Vaughn, The Opinions of the Merit Systems Protection Board: A Study in Administrative Adjudication, supra, at p.40.

In accessing the impact of the issuauce of advisory opinions in the instant case, it is imperative to consider the administrative and legislative history leading to the creation of the Board.

II. THE EXISTENCE AND USE OF ADVISORY OPINIONS IN THE INSTANT CASE

The case of *Robert L. Campbell, et al.*, proceeded to hearing, before Presiding Official Gayle E. Skaggs, on May 19-21, 24-25, 1982. On August 7, 1982, Presiding Official Skaggs rendered her initial decision in the Campbell case.

On February 1, 1983, lay representative Rex B. Campbell filed a Freedom of Information Act request with the Denver Regional Office of the Board. In response thereto, on February 3, 1983, Representative Campbell received the cover memorandum and advisory opinions which are attached as exhibits to the Motion for Partial Remand.

In the first instance, the cover memorandum describes the attached documents as "advisory opinions from Office of General Counsel". A reading of said documents indicates that this title is not a misnomar. The Board, in its Order and Opinion in the instant case, attempted to circumvent the prohibition contained in 5 U.S.C. §1205(g) by stating that the opinions case from the Office of the General Counsel. This distinction is a matter of form over substance in that the Office of General Counsel was created by and is part of the staff of the Board. See 5 CFR 1200, *et seq.* The Office of General Counsel is not an independent agency but rather is an arm of the Board.

The cover memorandum does contain a proviso that "presiding officials are not *obligated* to adopt the analysis and conclusions contained in the opinion" (See Exhibit A, of the Motion, emphasis added). One would have to question the motivation for putting such a disclaimer in the cover memorandum. Perhaps there was a concern that the document would be made public and that a great deal of controversy would flow from such a disclosure. Such an interpretation is given support by the admonition that "this opinion should not be placed in the record of any appeal" (See Exhibit A).

A comparison between the advisory opinions and the decision in the instant case, as well as others, clearly reflects the fact that the advisory opinions did influence and were incorporated into the decisions of presiding officials. Specifically, at a number of pertinent points, the decision of Presiding Official Skaggs in this case is taken almost verbatim from the advisory opinions. For example, see pages 52-56 of Skaggs' Interim Decision as compared with the advisory opinion dated April 21, 1982, dealing with the proper penalty to be employed. See also pages 48-49 of the same initial decision as compared with the advisory opinion dated April 29, 1982 at page 5 with respect to the Constitutionality of §7311.

Decisions by other presiding officials in the Denver Regional confirm the impact of the advisory opinions issued by the Board. Attached hereto as Exhibit A is a copy of the interim decision in the case of *Janet L. Apple, et al*, Case #DE075281F0653. The interim decision, issued by Presiding Official Stephen L. Chaffin, also borrows liberally from the advisory opinions. For example, compare Apple's initial decision pages 16-19 with April

21, 1982, advisory opinion regarding penalties. Also compare initial decision pages 37-38 with advisory opinion dated April 29, 1982, regarding the constitutionality of §7311.

The purpose of the discussion above is to establish a prima facia case that the advisory opinions did affect presiding officials generally and the outcome of the instant case. A stronger, more comprehensive record can only be established through an evidentiary hearing pursuant to the petitioners' Motion for a Partial Remand.

———o———

III. CONCLUSION

The arguments and documents contained in and attached to the instant motion and memorandum clearly demonstrates that advisory opinions were issued and did have an impact on the interim decision rendered in *Robert L. Campbell, et al.* The nature and degree of this impact, as well as its legality, can only be resolved if the case is partially remanded pursuant to the petitioners' motion.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY: /s/ KENNETH H. STERN
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CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing Motion in Support of Motion for Partial Remand by placing same in the United States mail this 6th day of July, 1983, postage pre-paid and properly addressed to:

Lorraine B. Halloway
Department of Justice
Civil Division, Commercial
Litigation Branch
Washington, D.C. 20530
/s/ Nancy Thienes

84-78

No. .....

In The
Supreme Court of the United States
October Term, 1983

ROBERT L. CAMPBELL, et al.,

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION;
FEDERAL AVIATION ADMINISTRATION,

Respondents.

ON WRIT OF CERTIORARI TO THE FEDERAL CIRCUIT COURT OF APPEALS

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ROBERT L. CAMBPELL, ET AL.[1]

v.

DEPARTMENT OF TRANSPORTATION

DOCKET NUMBER:
DE075281F0674

OPINION AND ORDER

I. Background

Appellants were removed from their positions as Air Traffic Control Specialists, Denver Air Route Traffic Control Center, Longmont, Colorado. Their removals were based on charges of: (1) striking against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918; and (2) unauthorized absence (absence without leave or AWOL). Appellants, 54 in all, petitioned for appeal of their removals to the Denver Regional Office of the Board. The appeals were consolidated by the presiding official pursuant to 5 C.F.R. § 1201.36(b).

With respect to each appellant, the presiding official found in a consolidated initial decision rendered on October 7, 1982, that the agency charges were supported by a preponderance of the evidence and that the penalty of removal was appropriate. She therefore sustained the agency actions. However, as to appellant Russell S. Root, the presiding official found that because he had notified the agency that he was ready, willing, and able to return to work prior to receiving his removal proposal, his place-

[1]All 54 appellants and their individual docket numbers are listed on the attached appendix.

ment by the agency in a non-duty, non-pay status during the removal notice period constituted an improper suspension. She ordered the agency to amend its records and to place appellant Root in a duty and pay status from August 8, 1981, the date he requested to be returned to work, until September 2, 1981, the effective date of his removal.

Appellants' petition for review of the initial decision is based on numerous contentions of harmful error by the agency and reversible error by the presiding official in sustaining their removals.[2] Also, the agency cross-petit-

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[2]Additionally, appellants filed a motion to strike the agency's submissions on review on the basis that the agency failed to file a notice of a change of its designated representative as, they assert, is required by 5 C.F.R. § 1201.31(a). They further assert that a February 2, 1982 Prehearing Order by the presiding official stated that the Board would not accept submissions from any person other than the designated representative or a *pro se* appellant.

While the Prehearing Order applied only to proceedings before the presiding official, the Board has held that the procedures for the designation of representatives as provided in 5 C.F.R. § 1201.31(a) are applicable in petitions for review before the Board. *See Riddick v. Office of Personnel Management*, 5 MSPB 263 (1981). We consider appellants' motion to strike as the equivalent of a request for a sanction against the agency for failing to comply with section 1201.31(a). Before imposing a sanction, however, the Board's practice is to provide the affected party an opportunity to comply with the regulation in question. Since, in this case, the agency was not afforded such an opportunity, the Board finds that the imposition of a sanction would be inappropriate. Moreover, in response to appellants' motion, the agency cured its defective filing by submitting a proper notice of change of representative. Also, we note that appellants have not shown any resulting prejudice to their rights. Therefore, appellants' motion to strike is denied.

Appellants also filed a motion to dismiss the agency charges on the basis that the notice of proposed removal was

(Continued on next page)

ions for review from the presiding official's finding that it improperly suspended appellant Root. We hereby GRANT review under 5 U.S.C. § 7701(e) (1).[3]

(Continued from last page)

issued contrary to law. Appellants have cited no authority to support the granting of that motion on the basis alleged. We find that the appropriate procedure for challenging any error in the notice of proposed removal is by petition for review, as has been filed by appellants. Therefore, appellants' motion to dismiss is also hereby denied.

[3]By notice published in the Federal Register, 48 Fed. Reg. 2235-36 (1983), the Board solicited *amicus* briefs on issues of law common to numerous appeals of former air traffic controllers. In response to that notice, a total of some 11 *amicus* briefs were filed, and all have been duly considered by the Board in its decision-making process.

In a letter to the Board dated March 7, 1983, Rex B. Campbell, the designated representative for appellant Robert L. Campbell, *et al.*, alleged that Special Presiding Official Kenneth Goshorn and agency representative Diane R. Liff engaged in an ex *parte* communication regarding the agency's motion to file a response to the *amicus* briefs. Because the charge involved a Board employee, it has been carefully investigated by the Board's Designated Agency Ethics Officer, Evangeline W. Swift. See 5 C.F.R. § 1201.103(b) (2).

Having examined Mr. Campbell's correspondence, Special Presiding Official Goshorn's Summary of Telephone Calls of February 23-24, 1983, and the Board order of March 17, 1983, granting the agency motion, the Ethics Officer has determined that the subject of the telephone communication in question was procedural in nature, and did not relate to the merits of a Board appeal or otherwise violate Board rules. She therefore concluded that it did not constitute a prohibited ex *parte* communication under 5 C.F.R. § 1201.102. This conclusion was conveyed to Mr. Campbell by letter dated April 14, 1983. We concur in that determination. Thus, no sanctions under 5 C.F.R. § 1201.103(b) are warranted under these circumstances. All of the documentation relating to this charge of ex *parte* communication is included in the official administrative record of this case.

II. Prima Facie Case of Strike Participation

In *Schapansky v. Department of Transportation*, MSPB Docket No. DA075281F1130 at 6 n.2 (October 28, 1982), the Board stated that "[i]n a case, such as this one, in which the existence of a strike is a matter of general knowledge, the agency may establish a *prima facie* case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike."[4] The Board further stated that the burden of going forward would then shift to the appellant to present evidence showing that he was without knowledge of the strike or that his absence from duty was due to some other factor. However, the agency bears the burden of ultimately proving by a preponderance of the evidence that the appellant had participated in the strike. *Id.*

In the instant case, appellants contend in their petition that the agency failed to establish a *prima facie* case of their participation in a strike against the United States Government. The presiding official found that the agency presented both documentary and testimonial evidence that appellants were AWOL during the strike and failed to report for their first regularly scheduled shifts subsequent to a 48-hour grace period granted by President Reagan on August 3, 1981.[5] She found that, except for appel-

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[4]This Board has previously taken official notice that a strike by air traffic controllers commenced on August 3, 1981, and continued through August 6, 1981. *Ketchem v. Department of Transportation*, MSPB Docket No. DA075281F0713 at 9 (May 28, 1982). Also, the Board found that the strike was unlawful under 5 U.S.C. § 7311 and 18 U.S.C. § 1918. *Id.* at 5.

[5]On August 3, 1981, at approximately 11:00 a.m., E.D.T., President Reagan announced that striking air traffic controllers

(Continued on next page)

lant Root, appellants made no request to be returned to work. Further, the presiding official found that appellants failed to even allege a legitimate nonstrike-related reason for their absence. Therefore, she concluded that the agency had sustained its burden of proving strike participation and absence without leave.

A. Hearsay Evidence

In arriving at that determination, the presiding official noted that the testimonial evidence on appellants' strike participation was presented by the Chief of the Denver Air Traffic Control Center, Ralph Kiss, who was without "firsthand knowledge" of the facts to which he testified, and that other agency officials with personal knowledge of the facts were present at the hearing. Nevertheless, relying on a line of Board cases holding that hearsay evidence may be admitted in proceedings before the Board,[6] the presiding official determined that the tes-

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(Continued from last page)

who failed to return to work within 48 hours would be terminated. The agency interpreted the announcement to allow a "grace period" during which those who reported for work at their first scheduled shifts after August 5, 1981, were not removed. *See Schapansky, supra,* at 11 n.9, *citing Air Traffic Controllers Strike,* 17 Weekly Comp. Pres. Doc. 845 (August 3, 1981); and *PATCO v. United States Department of Transportation,* 529 F. Supp. 614 (D. Minn. 1982). In a series of General Notices (GENOTS), the agency also allowed for regular days off and absence for other legitimate reasons which could have affected the deadline for returning. GENOT 128 (August 5, 1981); and GENOT 141 (August 10, 1981).

[6]See *Borninkoff v. Department of Justice,* 5 MSPB 150 (1981), and federal court cases cited therein. *See* also *Kunick v. Department of the Navy,* MSPB Docket No. SE07528110102 (January 19, 1982); *Lee v. Department of the Interior,* 6 MSPB 561 (1981); *Davies v. Department of Agriculture,* 5 MSPB 291 (1981); *Green v. U.S. Postal Service,* 3 MSPB 403 (1980).

timony provided by Mr. Kiss was worthy of evidentiary weight since it "was generally consistent, was corroborated by documents within the appeal record, was subject to cross-examination, and was uncontradicted by appellants." Initial Decision at 14-15. Further, the presiding official noted that appellants failed to object to the hearsay testimony proffered at the hearing.

In their petition for review, appellants now challenge the presiding official's admission of the hearsay testimony. Appellants assert that they requested the agency to produce a witness, John Schmidt, who allegedly had first-hand knowledge of the leave cancellation procedures utilized by the agency, but that the agency failed to do so. Appellants also allege that the presiding official failed to order the agency to produce the witness. The record shows, however, that Mr. Schmidt did testify at the appellants' request. Hearing Transcript (Tr.) at 805-813. On consideration of the record, we find no error in the presiding official's decision to assign probative value to the hearsay testimony.

B. Continuation of the Strike

Two appellants, David Gold and Thaddeus W. Wallace, were charged with strike participation commencing subsequent to August 6, 1981. The agency had initially charged appellant Gold with striking from August 13 to August 18, 1981, the date of the notice of his proposed removal, but thereafter conceded that appellant Gold was on a combination of approved annual leave, regular days off, and spot leave through August 16, 1981. Therefore, the agency amended the commencement date of appellant Gold's alleged strike participation to August 17, 1981. Ap-

pellant did not dispute the corrected agency deadline. He failed to report for his August 17, 1981 deadline.

Appellant Wallace was on approved annual leave and regular days off through August 12, 1981. His stated agency deadline was August 13, 1981. Appellant Wallace also failed to report for his agency deadline and was charged with strike participation from August 13, 1981, to August 19, 1981, the date of the notice of his proposed removal.

Both appellants challenge the presiding official's finding that the strike continued beyond August 6, 1981. The presiding official based her finding upon the following unrebutted evidence presented by the agency: media excerpts showing that leaders of the Professional Air Traffic Controllers Organization (PATCO) regarded the strike as continuing until as late as October 31, 1981; an October 28, 1981 submission made by PATCO before the Federal Labor Relations Authority (FLRA) concerning discontinuation of the strike;[7] and testimony by Mr. Kiss that picketing at the Denver facility continued until September 24, 1981, subsequent to the removal dates of all the appellants to this action. Tr. at 37.

In *Ketchem, supra,* at 9, the Board held that when an employee is charged with participation in the strike on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that the strike was in fact in progress on the date charged and that the employee could have returned to work on that date. We also held in

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[7]See *Professional Air Traffic Controllers Organization and Federal Aviation Administration,* 7 F.L.R.A. No. 10 at 2, footnote (November 3, 1981) (Supplemental Opinion of Ronald H. Haughton, Chairman).

Noa v. Department of Transportation, MSPB Docket No. NY075281F0697 at 14-16 (April 25, 1983), that in order to show continuation of the strike, the agency need not necessarily present evidence proving that on the charged date or dates there was a certain number of co-workers mutually withholding their services.

In consideration of the record, and in light of our discussion in *Noa, supra,* at 14-16, we find that it is more likely true than not true that the strike continued at least until August 17, 1981, when the last of three appellants (Wallace) could have returned to work. *Ketchem, supra,* at 9.

Further, the agency showed by testimonial evidence, as well as documentary evidence consisting of leave and attendance records, that both of these appellants were absent without authorization from the dates of their agency deadlines and had neither contacted the agency nor attempted to report for duty. Tr. at 373-80, 766-78. Therefore, we find that the agency established a *prima facie* case of strike participation by appellants Gold and Wallace on August 17 and 13, respectively. *See Schapansky, supra,* at 6 n.2. These appellants have failed to offer any evidence to rebut the agency's *prima facie* case by showing that they were without knowledge of the strike or that there was some other legitimate nonstrike-related reason for their absence. *Id.* Therefore, we find that the agency sustained its burden of proving by preponderant evidence strike participation by appellants Gold and Wallace.

It has been held that participation in a strike against the United States Government, however, "short-lived,"

justifies removal under 5 U.S.C. § 7311. *See American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280, 1284 (9th Cir. 1982), *cert. denied*, 51 U.S. L.W. 3606 (February 22, 1983) (No. 82-575). Thus, having found that the agency showed by preponderant evidence strike participation by these appellants on August 13 and 17, we need not address allegations of their strike participation on subsequent dates.

The remaining appellants were charged with strike participation for all or a portion of the August 3-6, 1981 official notice period[8] until the issuance of their notices of proposed removal.[9] The agency presented testimonial and documentary evidence showing that each of these appellants was absent without authorization during the official notice period. *See* Tr. at 187-801. (These pages include the extensive testimony presented by the agency to show unauthorized absence by these appellants). Thus, under *Schapansky, supra*, at 6 n.2, the agency established a *prima facie* case of strike participation by these appellants.

Several appellants sought to rebut the agency's *prima facie* case of strike participation by contending that they were on approved annual leave for at least a portion of the period for which they were charged with striking and AWOL. With respect to those appellants, the agency presented documentary and testimonial evidence of their

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[8]*See Ketchem, supra*, at 9.

[9]In light of the court's holding in *American Postal Workers Union v. U.S. Postal Service, supra*, at 1284, we also find it unnecessary to address allegations of these appellants' strike participation subsequent to the official notice period.

annual leave cancellation prior to the commencement of the August 3, 1981 strike as follows:

Michael A. Nord

The agency submitted a "Record of Conversation" indicating that on August 2, 1981, appellant's supervisor left a message with appellant's wife that appellant's annual leave was cancelled. This evidence was buttressed by Mr. Kiss' testimony to that effect. Tr. at 629-633. Appellant has not denied he received notice of the leave cancellation. Appellant failed to report for his August 6, 1981 deadline.

Shannon K. Redding

The agency submitted a "Record of Conversation" by appellant's supervisor, indicating that appellant was personally notified on July 31, 1981, of her annual leave cancellation. *See* Tr. at 680. Appellant failed to report for her August 6, 1981 deadline.

Russell S. Root

The agency submitted a "Record of Conversation" signed by appellant's supervisor. The document stated that a telephonic notification of appellant's leave cancellation was communicated to appellant's wife on August 2, 1981, and that she agreed to forward the message to appellant. At no time has appellant denied receiving the message from his wife. Appellant simply alleges that the agency failed to prove that his wife had relayed the message of cancellation to him.

We note, though, that Mr. Kiss telephoned appellant on August 4, 1981, and requested that he return to work

but that appellant refused. It is undisputed that annual leave cancellation was not discussed on that occasion. We find that Mr. Kiss' explanation that he did not mention leave cancellation because he was aware appellant had already been notified of the cancellation and that he was merely encouraging appellant to return to work was plausible. *See* Tr. at 688, 692-93. Appellant failed to report for his August 5, 1981 deadline. He called the agency on August 8, 1981, requesting to be returned to work. He was informed that he had missed his deadline and would not be allowed to return.

Darrell L. Taylor

The agency submitted a "Record of Conversation" showing appellant's wife was informed telephonically on August 2, 1981, of appellant's leave cancellation and that she agreed to notify him.[10] Appellant has not alleged that his wife failed to notify him that his annual leave was cancelled. Appellant failed to report for his August 6, 1981 deadline.

Thomas G. Weimer

The agency submitted a "Record of Conversation" indicating that on August 1, 1981, appellant was notified in person by his supervisor that his annual leave was cancelled. *See* Tr. at 790-91. Appellant does not deny that his leave was cancelled. Appellant failed to report for his August 5, 1981 deadline.

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[10]Appellant challenges an agency statement in his file concerning cancellation of annual leave and regularly scheduled days off in the event of a strike as unsigned and undated. Appellant has not further identified that statement, and it is not evident from review of appellant's file.

Further, the record shows that all of those appellants, as well as the other appellants in this consolidation, had been informed by the agency that all annual leave would be cancelled in the event of a strike, and each appellant's file contains a July 31, 1981 memorandum of annual leave cancellation. Appellants have not denied receiving those general notices of leave cancellation. Thus, we find that the agency showed by preponderant evidence that appellants' leave was effectively cancelled. *See McPartland v. Department of Transportation, MSPB* Docket No. DA-075281F1018 at 2-4 (February 8, 1983).

Except for appellant Russell S. Root, none of the appellants, including those who alleged that they were on scheduled annual leave for a portion of the period during which they were charged with striking, even claimed that they attempted to contact the agency regarding their job status or to return to work pursuant to the Presidential amnesty offer. Further, none of the appellants charged with striking during the August 3 to August 6, 1981 period has alleged lack of knowledge of the strike or absence from duty due to some other factor. *See Schapansky, supra,* at 6 n.2. Therefore, we find that the agency met its burden of proving by preponderant evidence strike participation by these appellants. *Id. See also Ketchem, supra,* at 9.

With respect to the propriety of the penalty, appellants have not appealed from the presiding official's finding that removal was appropriate for their strike participation. In any event, in *Schapansky, supra,* at 10-11, the Board found that under *Douglas v. Veterans Administration,* 5 MSPB 313 (1981), the agency's imposition of a removal penalty on an air traffic controller cannot be deem-

ed clearly excessive or disproportionate to a sustained charge of striking against the Federal government.

III. Unauthorized Absence

Appellants contend that the agency charge of unauthorized absence lacks specificity. They contend that the language, which they allege is identical in all cases except for the dates and times concerned, fails to clearly specify the period of AWOL.

Under 5 U.S.C. § 7513(b) (1), an employee against whom an adverse action is proposed is entitled to be informed of the specific reasons for the agency's proposed action. The information provided by the agency must be sufficiently specific to permit the appellant an opportunity to properly respond to the agency charge. *See Young v. Department of the Navy,* 7 MSPB 7, 10-11 (1981).

In this case, the AWOL charge as to each appellant alleges that, commencing on a specific date, the appellant failed to report for his scheduled tour of duty and has since remained absent without authorization. We find that the charge as alleged was sufficiently specific to apprise appellants of the reason for the charge and to provide them an opportunity to properly respond thereto. Further, as the presiding official noted, and the record clearly indicates, appellants' presentation at the hearing demonstrated that they understood the charges against them. *See Pinto v. Department of Labor,* MSPB Docket No. DE07528010140 (May 11, 1982); *Bize v. Department of the Treasury,* 3 MSPB 261 (1980). In view of the court's holding in *American Postal Workers Union v. United States, supra,* at 1284, that striking for any period of time

is cause for removal under 5 U.S.C. § 7311, we deem it unnecessary to address the agency's allegations of AWOL subsequent to the period for which we have found appellant's strike participation based on AWOL during the strike. We find that the evidence of unauthorized absence presented by the agency to establish appellants' strike participation likewise supports by preponderant evidence the charges of unauthorized absence for the same period.

IV. Readmission to Agency's Facility

Appellants allege that the agency's failure to inform them of their individual deadlines and ambiguities generated by the President's announcement and statements by the Secretary of Transportation[11] misled them into believing that they had already been discharged after the expiration of the Presidential grace period. They contend that under *NLRB v. Park Edge Sheridan Meat, Inc.*, 323 F.2d 956 (2d Cir. 1963), they were therefore not required to make a futile request to return to work. Appellants also rely on *Pennypower Shopping News, Inc.*, 253 N.L.R.B. 11, 105 L.R.R.M. 1433 (1980), and *Winn-Dixie Stores, Inc. v. NLRB*, 502 F.2d 1151 (4th Cir. 1974), in support of their contention. These cases address the legality of an employer's actions in "locking out" or discharging private sector employees engaged in protected

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[11]Indeed in *Ketchem, supra,* at 7-8, the Board quoted from Judge Green's holding in *United States v. PATCO,* 524 F. Supp. 160, 164 n.6 (D.D.C. 1981), noting the conflicting information resulting from "the multiplicity of the statements issuing from government officials and the contradictions and ambiguities that they involved."

strike activities under section 7 of the National Labor Relations Act.[12]

In the private sector, a "lockout," generally defined as "an employer's withholding of work from his employees in order to gain a concession from them,"[13] is unlawful when it "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of some right protected by section 7 of the [National Labor Relations] Act."[14] *American Shipbuilding Co. v. NLRB,* 380 U.S. 300, 308 (1965). One of the rights conferred by section 7 of the Act upon private employees is the right to strike.[15] In circumstances where unlawful lockouts or discharges of private employees exercising the right to strike occur, the employers concerned have consistently been ordered to reinstate the affected employees with back pay. *See Pennypower Shopping News, Inc., supra,* 105 L.R.R.M. at 1433-34; *Abilities & Goodwill, Inc.,* 241 N.L.R.B. 5, 100 L.R.R.M. 1470, 1472 (1979); *Winn-Dixie Stores, Inc. v. NLRB, supra,* at 1151-52; *NLRB v. Park Edge Sheridan Meats, Inc., supra,* at 959; *NLRB v. Valley Die Cast Corp.,* 303 F.2d 64, 66-67 (6th Cir. 1962); and *National Labor Relations Board v. Sunrise Lumber & Trim Corp.,* 241 F.2d 620, 625 (2d Cir. 1957).

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[12]See 29 U.S.C. § 158.

[13]*Brandenburg v. Capital Distributors Corp.,* 353 F. Supp. 115, 119 (S.D.N.Y. 1972), *quoting from* Restatement of Torts § 787 comment a. *See also Laclede Gas Co. v. NLRB,* 421 F.2d 610, 615 n.9 (8th Cir. 1970).

[14]See 29 U.S.C. § 158(a) (1), (3).

[15]See 29 U.S.C. § 157.

Further, in the private sector, where ambiguities in the employment status of legally striking employees have been generated by illegal acts of the employers, the uncertainties have been resolved in favor of the striking employees. *See Winn-Dixie Stores, Inc., supra,* at 1151-52; *NLRB v. Park Edge Sheridan Meats, Inc., supra,* at 957-59; and *NLRB v. Valley Die Cast Corp., supra,* at 66-67. These cases stand for the proposition that, where the private sector employees reasonably believed they had been unlawfully discharged, they were not required to engage in the futile act of notifying their employers of their intent to abandon the strike and their desire to return to work. However, where no illegal acts had been committed by the private sector employers, such notification was required by the striking employees. *Abilities & Goodwill, Inc., supra,* 100 L.R.R.M. at 1471.

In contrast, Federal employees have no similar statutorily conferred right to strike, but rather are expressly prohibited from striking by 5 U.S.C. § 7311 and 18 U.S.C. § 1918. *See Ketchem, supra,* at 5. Similarly, in *United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879, 882 (D.D.C.), *aff'd,* 404 U.S. 802 (1971), the Court noted the difference in treatment accorded public and private employers by Congress. The *Blount* court stressed that in the National Labor Relations Act of 1937, as well as the Labor Management Relations Act of 1947 (Taft-Hartley), the term "employer" was defined "as not including any governmental or political subdivisions, and therefore, indirectly withheld the protections of section 7 from governmental employees." Indeed, the Board is unaware of any instances in which the lockout principle, as applied in private sector cases, has been similarly ap-

plied in cases of prohibited striking under 5 U.S.C. § 7311 and 18 U.S.C. § 1918.

We find the private sector cases, upon which appellants rely to support their contentions of confusion and futility of notification, inapplicable to Federal employees engaged in an illegal strike under 5 U.S.C. § 7311 and 18 U.S.C. § 1918.[16] Any right by appellants, as illegally striking employees, to be readmitted to the agency's facility was specifically limited by the terms and conditions of the Presidential amnesty offer and subsequent interpretive directives issued by the agency. Thus, in order to be readmitted to duty, the appellants in this case were required to timely notify the agency of their availability and their desire to return to work on or before their next regularly scheduled tour of duty. Appellants could not properly have unilaterally expanded that limited right to include the right accorded legally striking employees to reasonably rely on confusion and the futility rule to relieve themselves of their responsibility of timely notification.

In any event, the futility rule employed in the private sector would nevertheless not apply in the instant case since the alleged confusion generated by the agency was not caused by any illegal acts on the part of the agency. *Abilities & Goodwill, Inc., supra,* 100 L.R.R.M. at 1471-72. Thus, we hold that despite any ambiguities and uncertain-

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[16]See *Bullock v. Mumford,* 509 F.2d 384, 388 (D.C. Cir. 1974), which holds that irrespective of "however valid the charge [by the strikers] may be, it does not excuse illegal and disruptive behavior." *See also Bennett v. Gravelle,* 323 F. Supp. 203 (D. Md.), *aff'd,* 451 F.2d 1011 (4th Cir. 1971), *cert. dismissed,* 407 U.S. 917 (1972), *disapproved on other grounds, Sethy v. Alameda Co. Water District,* 545 F.2d 1157 (9th Cir. 1976).

ties caused by the President's announcement or statements by agency officials regarding appellants' employment status, it was incumbent upon appellants to timely notify the agency of their readiness and desire to return to work and to inquire as to their individual deadlines in order to qualify for returning to work during the President's grace period. Since appellants failed to so notify the agency, they were properly subject to removal.

V. Procedural Error Contentions

Under 5 U.S.C. § 7701(c) (2) (A), the agency charges, although found supported by preponderant evidence, cannot be sustained where the appellant shows harmful procedural error by the agency in arriving at its decision. *See Parker v. Defense Logistics Agency,* 1 MSPB 489, 492-99 (1980). Appellants contend that the agency committed harmful procedural error in failing to provide them with 7 days for presenting an oral response to the agency charges as is required by 5 U.S.C. § 7513(b) (2). Appellants also contend that the oral reply process was rendered meaningless because the decision by the agency deciding official to remove them was based, not on his own independent judgment, but on the "command influence" of President Reagan and other high-level agency officials.

A. Oral Reply

Appellants contend that because the agency in its notice of proposed removal required them to respond to the charges "within 7 calendar days," they were afforded less than 7 days to respond in violation of 5 U.S.C. § 7513 (b) (2), which requires "not less than 7 days" to respond

orally and in writing.[17] Appellants also contend that they were given less than 7 days for oral response because of the agency's denial of their request for an extension of time. However, appellants failed to raise these contentions before the presiding official. Therefore, they cannot be considered on review. *See* 5 C.F.R. § 115; *Banks v. Department of the Air Force,* 4 MSPB 342, 343 (1980).

Appellants further contend that the oral response process was reduced to a mockery since, they assert, the agency was aware that it would have been logistically impossible for it to accommodate the numerous oral replies contemplated. In this regard, appellants have not shown that the oral reply process was defective because of the agency's inability to fully consider or hear the large number of oral responses presented. Appellants merely assert that the agency committed procedural error in failing to schedule the response of each appellant, requesting instead that appellants' representative undertake that task.

Neither 5 U.S.C. § 7513(b) (2), which confers upon appellants the right to an oral reply to the agency charges, nor its implementing regulation, 5 C.F.R. § 752.404(c) (2), requires the agency to schedule oral responses. Appellants' representative failed to schedule the responses as requested. Agency official Kiss, designated to hear the

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[17]In *Schapansky, supra,* at 7-8, the Board held that, in light of the felony provision of 18 U.S.C. § 1918, the agency could invoke the crime exception of 5 U.S.C. § 7513(b) (2) to waive the 30-day notice period otherwise required by 5 U.S.C. § 7513(b) (1) where the agency had reasonable cause to believe that the employee had engaged in strike participation prohibited under 5 U.S.C. § 7311 and 18 U.S.C. § 1918. Appellants have not appealed from the pending official's finding that the crime exception was properly invoked in the present case.

oral replies, testified that the agency would have extended the oral reply period to hear appellants' responses. Since appellants failed to exercise their statutory right to an oral response by refusing to schedule the response time, appellants have failed to show procedural error by the agency in its handling of the oral response process. *See Parker, supra,* at 492-99.

B. Command Influence

Appellants also contend that the "command influence" of President Reagan's announcement regarding the dismissal of air traffic controllers, who failed to report for duty during the grace period, precluded a meaningful consideration by the agency of appellants' responses to the agency charges. Appellants also allege "command influence" from the Secretary of Transportation and the Administrator of the Federal Aviation Administration. Appellants assert that the statements by those officials resulted in harmful procedural error since they precluded Mr. Ralph Kiss, the agency's deciding official, from acting independently in removing appellants.

In *Anderson v. Department of Transportation,* MSPB Docket No. SL075281F0347 at 8-13 (April 25, 1983), the Board held that neither the public statements of President Reagan and high level agency officials regarding the strike, nor the written communications from agency headquarters to the various facilities, impinged on the ability of deciding officials to exercise independent judgment regarding whether the charges in individual cases should be sustained, or in any manner deprived the appellants of a meaningful opportunity to reply to the charges on which their removals were based. Thus, appellants have not shown procedural error by the agency in this respect.

VI. Suspension

Appellants have not appealed from the presiding official's finding that, except as to appellant Root, appellants were not suspended during the notice period. Therefore, that contention will not be addressed on review.

The agency, however, cross-petitions for review of the presiding official's determination that appellant Root was improperly suspended because, prior to receiving the notice of proposed removal, he notified the agency that he was ready, willing, and able to report for duty but was not allowed to return.

The Board held in *Martel v. Department of Transportation*, MSPB Docket No. BN075281F0558 at 11 (April 25, 1983), that in order to meet his burden of establishing jurisdiction over an alleged constructive suspension during the notice period under 5 C.F.R. § 1201.56(a) (2), an appellant must show by preponderant evidence that he contacted an agency official with decision-making authority and unequivocally communicated his availability and desire to return to work. The Board held that such a showing would establish that the appellant was ready, willing, and able to return to work. *Id.* The Board further held that the agency's admission that it nevertheless refused to readmit the appellant would be sufficient to show that the appellant's absence after his attempted return was involuntary and disciplinary in nature. *Id.*

It is uncontested that appellant Root telephoned his supervisor on August 8, 1981, prior to the issuance of the notice of his proposed removal and clearly requested to be returned to work. Tr. at 689, 691-92. It is also undisputed that appellant was informed by his supervisor that

appellant had missed his deadline and would not be allowed to return. *Id.* Thus, under *Martel, supra,* we find that appellant Root was erroneously suspended by the agency from August 8, 1981, until September 2, 1981, the effective date of his removal.

VII. Other Contentions

A. Consolidation

Appellants contend that the presiding official improperly consolidated these appeals despite their objections thereto. Under 5 U.S.C. § 7701(f) and 5 C.F.R. § 1201.36(b), the presiding official is authorized to consolidate cases on his or her own motion where to do so would result in more expeditious processing of the cases and would not adversely affect the rights of the parties. Appellants have contended neither that the consolidation failed to expedite processing nor that their rights were harmed thereby. Therefore, appellants have not shown error by the presiding official in this respect. *See Noa, supra,* at 3-5.

B. Ex Parte Communications

Appellants also contend that the presiding official erred in refusing to find prohibited *ex parte* communications in public statements made by President Reagan and FAA Administrator Helms to agency officials with decision-making authority in these adverse actions. Appellants rely on 5 U.S.C. § 554(d) and *Camero v. United States,* 375 F.2d 177 (Ct. Cl. 1967), in support of this contention. Those authorities prohibit *ex parte* communications on facts in issue between decision-making officials and a party to the action.

The Board finds that the public statements made by President Reagan and FAA Administrator Helms cannot be deemed *ex parte* communications. Our regulations at 5 C.F.R. § 1201.101(a) explain that an *ex parte* communication is one made "between decision-making personnel . . . and an interested party to . . . [an adverse action] without providing the other parties a chance to participate." Since the statements in this case were public statements, appellants were not thereby excluded from participating fully in defending against their removal actions before the agency.[18]

C. Adverse Inference

Appellants further contend that the presiding official erred in drawing an adverse inference from their failure to testify at the hearing. Appellants assert that the presiding official's reliance on *Book v. U.S. Postal Service*, 6 MSPB 322 (1981), *aff'd*, 675 F.2d 158 (8th Cir. 1982), was misplaced. Appellants argue that under *Book, supra*, the presiding official is required to request that the appellant testify; then, if the appellant declines, caution him that his silence could affect the credibility of his arguments even though he is not obligated to testify. Appellants allege that since they were not so warned, the presiding official erred in drawing an adverse inference from their failure to testify. There is no requirement in *Book* that the presiding official first warn an appellant

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[18]To the extent that appellants' argument in this record may relate to the issue of the effect of these public statements on adverse action procedures before the agency, the Board notes that *Anderson v. Department of Transportation*, MSPB Docket No. SL075281F0347 at 8-13 (April 25, 1983), resolves that issue adverse to appellants' position.

regarding the consequences of his failure to testify, and we find no error by the presiding official under *Book, supra. See Adams v. Department of Transportation,* MSPB Docket No. NY075281F0424 at 14-15 (April 25, 1983).[19]

Accordingly, the initial decision of the presiding official is hereby AFFIRMED.

The agency is hereby ORDERED to amend its records so as to place appellant Root in a pay status from August 8, 1981, to September 2, 1981, the effective date of his removal. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within 20 days of the date of issuance of this Opinion. Any petition for enforcement of this Order

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[19]In their petition for review, and in a subsequent submission dated March 15, 1983, appellants allude to an April 21, 1982 research assistance memorandum from the Board's Office of General Counsel to the Board's then Acting Assistant Managing Director for Regional Operations. Appellants suggest that Board proceedings relating to the air traffic controller strike which commenced on August 3, 1982, were merely *pro forma.* The record in this case simply does not support this allegation.

The memorandum in question expressly stated that it was not intended to influence presiding officials' decisions. Presiding officials were not obligated to adopt the mode of analysis or the conclusions in the memorandum. In fact, presiding officials were cautioned to conduct their own legal research and to exercise independent fact-finding responsibility and judgment. The different findings on similar issues in the air traffic controller appeals evidence that presiding officials did undertake their own legal research and made independent fact findings. Nor can the memorandum be properly deemed to have been an "advisory opinion" issued by the Board in violation of 5 U.S.C. § 1205(g). The Board members did not consider or vote on the memorandum, and it can not in any way be construed as an expression of their views, collectively or individually. Nothing in 5 U.S.C. § 1205(g), or elsewhere, bars the Office of General Counsel from preparing research assistance memoranda.

shall be made to the Denver Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

Appellants are hereby notified of the right to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellants' receipt of this order.

FOR THE BOARD:

April 25, 1983 (Date) /s/ Herbert E. Ellingwood
Chairman

April 25, 1983 (Date) /s/ Ersa H. Poston
Vice Chair

April 25, 1983 (Date) /s/ Dennis M. Devaney
Member

Washington, D. C.

No. 84-78

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT L. CAMPBELL, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly found that the agency had satisfied its burden of persuasion with respect to petitioners' participation in the air traffic controllers' strike.

2. Whether the notices of proposed removal sent to petitioners improperly provided less than seven days for a response.

3. Whether internal memoranda of the general counsel of the Merit Systems Protection Board violated 5 U.S.C. 1205(g), which provides that the Board "shall not issue advisory opinions."

4. Whether the court of appeals correctly sustained petitioners' removal as an appropriate penalty for their participation in an unlawful strike against the United States.

PARTIES TO THE PROCEEDING

The petitioners before the court of appeals are listed at Pet. App. 14. The petition does not indicate whether it is filed on behalf of all of these parties.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-78

ROBERT L. CAMPBELL, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 735 F.2d 497. The opinion of the Merit Systems Protection Board (Pet. Supp. App. 1-25) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1984. The petition for a writ of certiorari was filed on July 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. On August 3, 1981, the Professional Air Traffic Controllers Organization (PATCO) called upon its members to engage in a nationwide strike against the United States. See *Anderson* v. *Department of Transportation*, 735 F.2d 537, 539 (Fed. Cir. 1984). The same day, the President of the United States issued the following announcement at 11:00 a.m. eastern daylight time (*ibid.*):

> I must tell those who failed to report for duty this morning they are in violation of the law [1] and if they do not report for work within 48 hours they have forfeited their jobs and will be terminated.

The Federal Aviation Administration, which employed the controllers, implemented the 48-hour deadline by sending a notice of proposed removal to each controller who failed to report for duty at his first scheduled shift after 11:00 a.m. eastern daylight time on August 5, 1981 (*ibid.*).

Petitioners are among the more than 11,000 controllers who did not report for duty after August 3, 1981. Between August 7 and 19, each was sent a notice of proposed removal after it was determined that he had missed his deadline shift. Each notice stated that "you may reply to this notice personally, in writing, or both * * * within 7 calendar days

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[1] 5 U.S.C. 7311(3) provides:

> An individual may not accept or hold a position in the Government of the United States * * * if he * * * participates in a strike, or asserts the right to strike, against the Government of the United States * * *.

18 U.S.C. 1918 provides for criminal penalties against those who violate Section 7311.

after you receive this letter." Petitioners' requests for extensions of time within which to reply were denied. None of the petitioners made a reply affirming or denying the charges against him during the seven-day period; although their designated representative had been informed that petitioners could call their Air Traffic Control Center to schedule times for oral replies, none of them did so. Each petitioner was subsequently removed from his position. Pet. App. 2.

b. Following their removal, petitioners appealed to the Denver Regional Office of the Merit Systems Protection Board. After a five-day hearing on their consolidated appeals, the presiding official issued a decision sustaining their removal. The full Board affirmed (Pet. Supp. App. 1-25). Petitioners then sought review by the United States Court of Appeals for the Federal Circuit. Theirs was one of nine appeals treated as a "lead case" by the court of appeals, while more than 3,000 other appeals were stayed pending decisions in the lead cases.

2. On May 18, 1984, a five-judge panel of the court of appeals issued eleven decisions in the nine lead cases.[2] Relying in part (Pet. App. 3-4) on its

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[2] In addition to the instant case, the court below decided the following cases: *Schapansky* v. *Department of Transportation*, 735 F.2d 476 (Pet. App. 16-37); *Adams* v. *Department of Transportation*, 735 F.2d 488 (Pet. App. 38-58); *Martel* v. *Department of Transportation*, 735 F.2d 504; *Johnson* v. *Department of Transportation*, 735 F.2d 510; *Dorrance* v. *Department of Transportation*, 735 F.2d 516 (Pet. App. 58-66); *Novotny* v. *Department of Transportation*, 735 F.2d 521; *Moylan* v. *Department of Transportation*, 735 F.2d 524; *DiMasso* v. *Department of Transportation*, 735 F.2d 526; *Le-*

decisions in two other lead cases, *Schapansky* (Pet. App. 16-37) and *Adams* (Pet. App. 38-58), the court rejected each of the arguments now advanced by petitioners. The court held in *Schapansky* (Pet. App. 23-28) that the burden of proof had not been impermissibly changed by the Board and that petitioners had not been denied an adequate opportunity to present evidence with respect to their participation in the strike. In *Adams* (Pet. App. 41 n.3), the court rejected as "semantic and senseless" the argument that the removal notices, which provided for a reply "within 7 calendar days," violated the statutory requirement (5 U.S.C. 7513(b)(2)) that "not less than 7 days" be allowed for a reply. The court also held (Pet. App. 7-9) that 5 U.S.C. 1205(g), which prohibits the Board from issuing advisory opinions, does not prohibit its general counsel from circulating to Board officials "legal memoranda reflecting research into common issues." Finally, in *Schapansky* (Pet. App. 31-32), the court held that removal for participation in an illegal strike was a permissible penalty, without addressing the question whether removal was mandatory under the statutes (5 U.S.C. 7311, 18 U.S.C. 1918) prohibiting strikes by employees of the United States.

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tenyei v. *Department of Transportation*, 735 F.2d 528; and *Anderson* v. *Department of Transportation*, 735 F.2d 537. The court also decided one case involving the removal of a supervisory air traffic controller, *Brown* v. *Department of Transportation*, 735 F.2d 543. The court affirmed each of the removals except for the supervisor's and Letenyei's. Two petitions (Nos. 84-258, 84-259 (filed Aug. 16, 1984)) are pending in which certain of the air traffic controllers whose claims were decided in these cases are seeking review by this Court.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the issues raised by petitioners, which concern for the most part minor alleged improprieties in the procedural aspects of their removal, are not of such exceptional importance as to justify review by this Court, in light of the exclusive jurisdiction over appeals from the Merit Systems Protection Board vested in the United States Court of Appeals for the Federal Circuit. 28 U.S.C. 1295(a)(9). Accordingly, further review is unwarranted.

1. Petitioners challenge (Pet. 12-19) the allocation of the burden of proof adopted by the Board and approved by the court of appeals with respect to whether an employee has participated in an unlawful strike. The approach applied below properly requires that the agency bear at all times the burden of persuasion with respect to strike participation: the agency must show by a preponderance of the evidence that the employee withheld his services in concert with others (Pet. App. 24-25).[3] Once the agency has presented a

[3] Although the Board stated at one point that the burden of persuasion would shift to the employee (see Pet. 13), the court of appeals correctly stated in *Schapansky* (Pet. App. 25) that "[i]t is clear * * * from a reading of the challenged phrase in the context of the entire opinion that the Board in actuality placed a burden of production, not persuasion, on Schapansky following presentation of the agency's *prima facie* case." See Pet. Supp. App. 4 (Board explains that employee's burden under its *Schapansky* decision is "to present evidence showing that he was without knowledge of the strike or that his absence from duty was due to some other factor. However, the agency bears the burden of ultimately proving by a preponderance of the evidence that the [employee] had participated in the strike").

prima facie showing of participation by evidence of the employee's unauthorized absence during a strike of general knowledge, "the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing" (*id.* at 24). Petitioners presented no evidence at the five-day hearing before the Board's presiding official to rebut the inference that they had participated in the strike, to excuse their unauthorized absences from work, or to suggest that, although "the strike was well and widely known" (*ibid.*), they had no knowledge of it. See Pet. Supp. App. 4-5, 12. In these circumstances, the conclusion that the agency had established, by a preponderance of the evidence, that petitioners had withheld their services in concert with others was amply justified.[4]

Petitioners contend that the Board and the court of appeals departed from prior practice by failing to require direct proof that the employee actively participated in the strike.[5] It is clear, of course, that the

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[4] The burden of production following the agency's presentation of a prima facie case was not "impermissibly shift[ed] * * * to the employee" (Pet. 18-19). It is wholly justifiable to require that the employee come forward with evidence, to which he would have the most direct access, explaining his unauthorized absence, once the agency has presented a prima facie case. See Pet. App. 25 ("Absent effective rebuttal [of the prima facie case], the agency must be held to have carried its burden of persuasion."). See generally *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-256 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

[5] Contrary to petitioners' representation (Pet. 18), the court did not hold that "mere absence during a strike of general knowledge will sustain a finding of strike participa-

agency may prove its case through circumstantial evidence. See, *e.g.*, *United States Postal Service Board of Governors* v. *Aikens*, No. 81-1044 (Apr. 4, 1983), slip op. 2 n.3. No removal case has required direct evidence of participation in a strike or proof of an overt act of participation beyond unauthorized absence from work where, as here, the agency's prima facie case of participation stands unrebutted.[6]

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tion." Rather, the court required that the agency produce evidence of unauthorized absence during such a strike; if the employee were to come forward with evidence explaining his absence, a finding of participation might not be supportable, depending on all of the circumstances of the particular case (Pet. App. 24-25).

[6] The cases cited by petitioners (Pet. 18) do not conflict with the decision below. In *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879, 884 (D.D.C.) (three-judge court), aff'd mem., 404 U.S. 802 (1971), a challenge to the constitutionality of the statutory prohibitions against strikes by federal employees (see note 1, *supra*), the court stated only that participation in a strike means the withholding of one's services in concert with others, the same definition applied by the court of appeals here. *TVA* v. *Bailey*, 495 F. Supp. 711 (E.D. Tenn. 1980), an injunctive action, adopted the definition of strike participation set forth in *United Federation of Postal Clerks*. The court did not address the question whether proof of unauthorized absence during a strike of general knowledge would be sufficient to sustain an employee's removal. Rather, the court found only that an injunction was not justified in light of the absence of proof that the defendants had actually withheld their services in concert with others. *United States* v. *McCubbin*, No. 81-2059 (10th Cir. Aug. 22, 1983), is, as the court of appeals recognized (Pet. App. 43), inapposite because it was a criminal contempt proceeding requiring proof beyond a reasonable doubt, rather than a civil case such as this requiring proof only by a preponderance of the evidence (see 5 U.S.C. 7701(c)(1)(B)). Moreover, in *McCubbin*, a reasonable doubt existed with re-

To the contrary, the standard adopted by the Board and approved by the court is fully consistent with the applicable precedents.[7] See Pet. App. 27-28 ("The Board's decision in the present case did not change the standard of proof necessary to show strike participation, but merely clarified it."). Accordingly, there is no merit to petitioners' contention that they were denied a fair opportunity to present evidence on their own behalf by a post hoc change in the law.[8]

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spect to the defendants' failure to obey a back-to-work order because their absences could have been due to resignations rather than participation in the strike. Here, by contrast, petitioners have not argued that their removal was improper because they had resigned first.

[7] Although the prior decisions of the Board cited by petitioners (Pet. 13) as in conflict with its air traffic controller cases addressed situations involving picketing, the Board did not require any evidence of strike participation beyond what was produced here. Rather, the Board held only that the employees in those cases had successfully rebutted the evidence of strike participation by coming forward with evidence explaining their absence from work during the strike by their fear of personal injury if they crossed the picket line. See *Duckett* v. *TVA*, 9 M.S.P.B. 542 (1982); *Jones* v. *TVA*, 9 M.S.P.B. 550 (1982). Here, of course, petitioners produced no such evidence.

[8] Petitioners' claim of a due process violation is particularly unpersuasive because they point to no specific evidence that they would have introduced had they better understood the standards applied by the Board (see Pet. App. 28). Unlike many other controllers, petitioners did not take advantage of the opportunity afforded them before the Board to present evidence that they had not actually or willingly participated in the strike (*ibid.*). Petitioners' reliance on the Administrative Procedure Act fails not only because the Board did not depart from its previous standards, but also because neither

2. Petitioners' argument (Pet. 19-20) that their notices of removal improperly allowed less than seven days for a reply is meritless.[9] The court of appeals correctly determined (Pet. App. 41 n.3) that the notices, which called for replies "within 7 calendar days," allowed for the full seven days required by the statute. In any event, as the court noted (*ibid.*), petitioners have failed to show any harmful error (5 U.S.C. 7701(c)(2)(A)), because they have not pointed to any evidence of a reply that they could only have made on the seventh day, but failed to make because of a mistaken interpretation of the removal notices.[10] Finally, petitioners have waived this issue by failing to present it to the Board's presiding official (Pet. Supp. App. 18-19).

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the notice-and-comment nor the adjudication provisions of the Act apply to personnel matters. See 5 U.S.C. 553(a)(2), 554(a)(2). See generally *Stewart* v. *Smith*, 673 F.2d 485, 496-500 (D.C. Cir. 1982). The procedures relating to adverse actions against federal employees are governed by 5 U.S.C. 7501 *et seq.* and 5 U.S.C. 7701 *et seq.*

[9] 5 U.S.C. 7513(b)(2) provides that "[a]n employee against whom an action is proposed is entitled to * * * a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer." Petitioners were not provided with the 30 days' advance notice normally required because there was "reasonable cause to believe [they] had committed a crime for which a sentence of imprisonment may be imposed" (5 U.S.C. 7513(b)(1); see 18 U.S.C. 1918). Petitioners do not now challenge the application of this exception.

[10] Petitioners' argument that any violation of the governing statute requires reversal would render a nullity the statutory requirement that harmful error be demonstrated. See Pet. App. 54-58 (Nies, J., concurring).

3. Petitioners argue next (Pet. 20-22) that legal memoranda of the Board's general counsel could not be distributed within the Board consistent with 5 U.S.C. 1205(g), which states that "[t]he Board shall not issue advisory opinions." The court of appeals correctly found (Pet. App. 8-9), however, that Section 1205(g) proscribes only the issuance by the Board of advisory opinions to the public, analogous to the prohibition of the federal courts from issuing advisory opinions. It would be incongruous to suppose that the Board's office of general counsel, whose primary function is to provide "legal advice to the Board and its staff" (5 C.F.R. 1200.10(c)), could not inform Board personnel of the results of its research. Nor is there any reason to believe that the general counsel's memoranda on the issues facing the Board in dealing with the unprecedented situation of the removal of more than 11,000 employees somehow improperly influenced the proceedings before the Board.[11]

4. Finally, petitioners contend (Pet. 22-25) that the Board improperly held that removal was the mandatory penalty under 5 U.S.C. 7311(3) for striking against the United States. Neither the Board

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[11] The Board noted (Pet. Supp. App. 24 n.19):

> The memorandum in question expressly stated that it was not intended to influence presiding officials' decisions. Presiding officials were not obligated to adopt the mode of analysis or the conclusions in the memorandum. In fact, presiding officials were cautioned to conduct their own legal research and to exercise independent fact-finding responsibility and judgment. The different findings on similar issues in the air traffic controller appeals evidence that presiding officials did undertake their own legal research and made independent fact findings.

nor the court of appeals, however, addressed this issue.[12] See *Schapansky* v. *FAA*, 1982 Fed. Mer. Sys. Rep. (Lab. Rel. Press) ¶ 7047, at XI-113 (MSPB Oct. 28, 1982) ("In the present case we need not decide whether, as a matter of law, mitigation of the penalty is foreclosed under § 7311(3)."); Pet. App. 31-32 ("Whether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not be here decided."). Rather, as the Board[13] and the court of appeals found, removal for striking against the United States in violation of the law and one's oath was fully justified under the circumstances of these cases (Pet. App. 30, 32):

> Congress has determined that removal is an appropriate penalty for striking against the government. * * * Long and excellent service creates no license to violate a criminal statute against striking, and to violate one's oath taken on the day of employment that one would not strike. * * *

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[12] Moreover, petitioners did not appeal to the full Board from the presiding official's determination that removal was an appropriate penalty for their strike participation (Pet. Supp. App. 12).

[13] In *Schapansky*, the Board noted (1982 Fed. Mer. Sys. Rep. (Lab. Rel. Press) at XI-113 (footnote omitted)):

> [T]he position of air traffic controller is a highly sensitive one because the incumbent is directly responsible for the safety of airline passengers and must preserve the confidence of the employer and the public who rely on him. A controller's intentional and ongoing abdication of that responsibility in order to participate in the strike, and his decision to continue striking despite the President's 48-hour grace period, thus constitute particularly egregious conduct which destroys the controller's unique relationship of trust with his employer.

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> [T]he penalty here was not arbitrary, capricious, or otherwise not in accordance with law.

Removal was clearly well within the agency's discretion here, where "the inescapable and thus intentional goals of [petitioners], absent prompt governmental capitulation, were to inflict harm of the highest magnitude upon the national transportation system, to cause great public inconvenience, to injure the national economy, and to place at risk the public safety" (Pet. App. 29).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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